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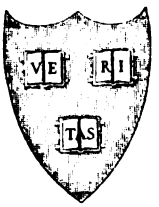

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A TREATISE

ON

PRIVATE INTERNATIONAL LAW,

WITH PRINCIPAL REFERENCE TO ITS PRACTICE IN ENGLAND.

THIRD EDITION.

BY

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PREFACE TO THE THIRD EDITION.

In this Edition the English authorities are brought down to date, but the scope and plan of the work are not altered.

Chelsea,
18*th June*, 1890.

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PREFACE TO THE SECOND EDITION.

THIS work differs in many points from that published in 1858, to which it stands in lieu of a second edition.

English authority has now touched almost every part of private international law, generally giving a clear deliverance, but sometimes varying, or noticing a point without deciding it. It is therefore possible to present the English view in a series of propositions or of topics, which I have done, marking them off by the sign § from other exposition and discussion, and adding the authorities after each in smaller type.

The other exposition and discussion here referred to is mainly intended for students, whose thoughts I have wished to direct, first, to the general connection of the subject with the history of law in Europe during the last two thousand years, and secondly, to the comparison of received English doctrines with those current at the present day in other countries. Thus, while often pointing out the causes which have made received English doctrines what they are, I have not said much of the reasons why they should be maintained or altered: the doctrines are mostly so well established in the courts that those reasons would be of little use, except in quarters which it would be idle to address in a law-book. Thus also I have mentioned but little the classical jurists of this branch of law. To do otherwise would have involved more detail than it seemed proper to afford to the history, while the present state of private international law abroad is

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only to be learnt from the most modern codes, decisions and writers. To be complete even in the two directions indicated would have required another volume as large as this, but I trust that the powerful stimulants of growth and diversity have been sufficiently exhibited to excite the curiosity of students, in a subject in which they have often been cheated by the empty assertion of universal agreement.

Writing with the views here explained, it has followed that when I have invited the reader to look abroad, it has almost always been in Europe and not to America. The jurisprudence of the United States on private international law is rich, but it is too like our own to serve my purpose with students, while the practitioner will find its results embodied in the American treatises. It would have required the leisure hours of years to examine the United States decisions as carefully as I have here examined the English ones, and with less care it would have been absurd to compete with their native exponents.

The order selected for treating the subject is that which seemed best fitted for explaining it to a student who should read the book consecutively, without previously knowing anything of this branch of the law. Since detailed statements on any part are often puzzling before a general view has been obtained, the necessary general notions are delivered in the first two chapters by a kind of successive approximation.

The year of each English reported decision has been given. This, besides the historical purpose served, will enable those who possess other reports than such as are cited to find the cases easily, so far as the reports they have may contain them.

The names of the judges have also been given. The legal literature of England need not shrink from a comparison with that of the continent, but the judges mainly take the place in

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it which authors hold in countries where the bench belongs to the profession of the civil service, instead of being recruited from the most eminent members of the bar, and where the only reasons given for a decision are those incorporated in the formal judgment. To name the English authorities is therefore a tribute due not more to them than to the country, which is often supposed to be deficient in reasoned law, because its mode of expression is peculiar. I regret that the habit in the privy council, of not disclosing what judges compose the majority, has made it impossible to attach any names to the decisions of that august court but those of the members who delivered them respectively. It is a habit which detracts from the weight of the decisions as reason, without adding to their authority as law.

LINCOLN'S INN,
22*nd July*, 1880.

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ADDENDA.

PAGE

65. *Brinkley* v. *Att.-Gen.* is now reported 15 P. D. 76.

65, § 34, and 88, Legitimacy. There is a curious case of *re Ullee, the Nawab Nazim of Bengal's infants;* 1885; 53 L. T., N. S. 711, Chitty; 54 L. T., N. S. 286, Baggallay, Bowen and Fry. The Nawab Nazim, a Mahometan British subject, domiciled in British India, and who had at least one wife living in that country, went in England through a ceremony of marriage according to Mahometan rites with a Christian Englishwoman who did not know that he had any other wife. The issue of that union were treated by the British Government of India as being children of the Nawab Nazim, and it seems that this could not have been otherwise, whatever opinion was entertained about the effect of the marriage ceremony, because the father had recognised them and, as Mr. Justice Chitty said, "that the Mahommedan law allows recognition to establish legitimacy is clear from the authorities referred to by Mr. Macnaghten in his argument." The status of the children in England was discussed, but it was not necessary to determine it. Had it been so, Mr. (now Lord) Macnaghten's argument in favour of their legitimacy, which was in effect that the personal law of the father ought to be as efficacious in the case of legitimation by acknowledgment as in that of legitimation by subsequent marriage, appears to be conclusive, and Mr. Justice Chitty evidently leant to that opinion. If in similar circumstances it should become important to determine the effect of the ceremony as constituting a valid Mahometan marriage, the first question would be whether the woman intended such a marriage, and if she did it might be argued, in accordance with the principle of § 26, p. 60, and having regard to the man's Indian domicile, that he might marry with the forms of his own law where the *lex loci actus* supplied no applicable form.

150, § 130. It is no ground for staying proceedings in an English bankruptcy that there is a prior adjudication of bankruptcy against the same debtor in a foreign country which is not that of his domicile; if the prior adjudication had been in the domicile, *quære*. *Re Artola Hermanos, exp. André Châle*, 1890, 24 Q. B. D. 640, Coleridge and Fry; Esher's agreement in the point decided is stated.

34. *Macartney* v. *Garbutt* is now reported 24 Q. B. D. 368.

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PRIVATE INTERNATIONAL LAW.

CHAPTER I.

INTRODUCTION.

PRIVATE international law is that department of national law which arises from the fact that there are in the world different territorial jurisdictions possessing different laws.

In order to explain more fully the position which private international law occupies in the field of law, that field must be looked at rather widely. The word *law* is applied both to the laws of nature and to human laws, and if we were discussing an ordinary division of national law, as mortgage or larceny, there would be no need to speak of any laws except human ones. But theories of natural law, or of a law of nature, have been so mixed up with international law that justice can hardly be done to our present subject without noticing every sense in which the word *law* is used.

The laws of nature are invariable uniformities: if any deviation were proved, the conclusion would not be that the law had been broken, but that the supposed law did not exist. Human laws are continually broken, and courts of justice, and armies so far as their employment is properly defensive, are instituted to correct their breach. It is true that if we look at the rule prescribed by a human law rather than at its observance, the singleness of the rule, compared with the multiplicity of the instances which call for its application, reminds us of the uniformities of nature; and probably this was the similarity which caused the word *law* to be extended from human laws to natural. Then, the extension having been

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made, it has sometimes been attempted to give it a philosophical justification by the remark that human laws will certainly be mischievous, and probably will not long endure, if they are not framed with due regard to the natural laws that govern the facts about which they are concerned. Thus, a law about buildings will miss its aim if it disregards the natural laws of health, and one about spirituous liquors if it disregards the natural laws of human conduct. Now this may be expressed by saying that human laws ought to be conformable to natural ones; and then it is easy, first to forget the difference between *ought to be* and *are* conformable, and secondly to forget that even when human laws are conformable to natural ones, that no more implies a likeness between them in kind, than the conformity of a marksman's aim to the laws which govern the flight of his bullet implies a likeness in kind between the act of aiming and the flight of the bullet. The truth is that it would be difficult to frame any proposition in which the word *law* should stand, and which should be true both of the laws of nature and of human laws, unless such proposition were a mere statement, more or less disguised, of the fact that each are in some sense uniformities; and the homonymy of the laws of nature and human laws must therefore be regarded as little more than fortuitous.

If this is so, human laws are not a division, correlative to the laws of nature, of a single field of law, but are a subject incapable of being brought under any wider general head. Indeed more will have to be said before it can be assumed that even all the human institutions which are called laws can be properly brought under one general head, for international law has been denied a claim to be law in the sense in which national law is such.

The prominent feature of national law is that it is a body of rules, to be uniformly applied to the cases that fall within them, and of which the breach is redressed or punished by a force irresistible to the individual subject, and regularly applied through courts of justice. This redress or punishment, which is generally spoken of as the enforcement of the law, though that term might more properly imply its specific enforcement, makes the chief difference between law and usage. Law is often traceable to usage, in the

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sense that what was once usage afterwards became law without express enactment. Examples of this may be found in the history of the law of many countries with regard to the distribution of the estates of deceased persons, and the effect of marriage on the property of the husband and wife. In such cases the passage from usage to law is sometimes represented as gradual. That, however, can never really have been so. The frequency of the usage may have gradually increased, and so also may the stringency of the general disapprobation with which its breach was visited. But either there was no administration of justice at the place and time in question, and then society was too barbarous for any thing answering to national law to exist in it, or else, when the administration of justice began to redress or punish the breach of the usage, a distinct step was taken, however little it may have been noticed at the moment, by which the boundary between usage and law was crossed.

The breach of international law is not redressed or punished by any force regular in its action and irresistible to individual states, and the rules which are understood to compose that law are often so vague that the uniformity of their application cannot be conclusively tested, even for the purpose of argument, so difficult is it to ascertain the individual cases to which they should apply. The latter circumstance results from the former. No set of rules, national or international, will ever be reduced to a reasonable certainty unless they are regularly applied, or some authoritative judgment is passed on the question of their application. Hence it would be difficult to frame any verbal definition of law which should include both national and international law. The very notion of uniformity, on which a link, thin and insufficient for the purposes of a serious classification, may be established between national laws and those of nature, fails us here, unless for many of the uniformities of international law we accept the pious intentions of writers instead of the hard facts of statecraft and hereditary enmity. There is however another mode of defining than by verbal formulas. In zoology and botany a genus is defined by the circumstance that every species within it is on the whole more like one or two typical species than it is to any

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species outside the genus. Now there are rules of international law, as those concerning diplomatic intercourse, which receive an amount of observance equal to that which is received by national laws. In the case of other rules, the risk that the mischief of a breach will recoil on the perpetrators is greater than in the case of most of the social usages which prevail between the subjects of a state. But again the extremes of vagueness and inobservance are presented by rules so important as those which are vaunted as protecting populations from arbitrary conquest, and private property on land from capture and appropriation in war. The truth is that the precision and stringency of international law range from a point below that of ordinary social usages, to a point at which the redressing or punishing power lacks only regularity of action, the strength of its irregular manifestations being sufficient for practical purposes. If then any one, taking national law described as in the last paragraph for the typical species of human law, should yet conclude that international law is on the whole more like to it than to the usages which we see prevailing outside law, there seems to be no sufficient ground for rejecting his conclusion as unphilosophical or contrary to facts. Nor is it wonderful that the type definitions of the sciences of organic life should be found to give a better model than the verbal formulas of mechanics, for classifying the phenomena which are produced by the living force of humanity. In fine, national and international laws may be accepted as divisions of the field of human law, without disrespect to those who have contended that the latter division would better be called positive international morality.

In the field thus mapped out, the place of private international law is in the division of national law. Private international law is administered by national courts, and generally to subjects, though, when states submit themselves to national courts, its doctrines are applied to them as well as those of any other department of national law. The actions in which it is administered are not a distinct class, like those in which criminal law is administered, but it finds its unity in a certain class of questions which may arise in any action, those namely in which it is sought in what national jurisdiction an action ought to be brought, or by what national law it ought to be decided.

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The word *jurisdiction* is popularly used in the general sense of competence, as when the common law and equity jurisdictions, which differed in respect of the matter, were formerly contrasted in England, or as when the jurisdiction of a county court, which is limited in respect of the value, is contrasted with that of the High Court. But in the present subject we have only to do with jurisdiction in the territorial sense, nor in that sense so far as jurisdictions, like those of two county courts, may be territorially distinguished within a country which enjoys in the last resort a unity of legal administration, but only with reference to territories which are separate for the purpose of law, as England and France, or England and Scotland. Such jurisdictions and their laws may be called national, in harmony with the use already made in this chapter of the term *national law*, and then the department which treats of the selection to be made in each action between various national jurisdictions and laws will not unreasonably be called international law, distinguished by the epithet *private* from the international law which prevails between states, and which may be distinguished as public. Hence in this subject the force of the term *private* is independent of any classification of national law into public and private. Those classifications, of which several have been proposed, generally assign criminal law to the public branch, but the question of the principles on which treaties for the extradition of criminals ought to be framed, being intimately concerned with the question in what national jurisdiction a criminal ought to be tried, is not separable from private international law as here understood.*

The principal grounds for selecting a particular national jurisdiction in which to bring an action are that the subject of the action, if a thing, is situate, if a contract, was made, if a delict, was committed, within the territory: hence the *forum situs*, or *rei sitæ*, *contractus*, *delicti*, the two latter of which are classed together as the *forum speciale obligationis*. Or that the jurisdiction is that in which all the claims relating to a certain thing or group of things ought to be

* The opposite view, that all law ought first to be divided into public and private and each of these departments subdivided into national and international, is expressed by the form "international private law," which is preferred by Professor Holland.

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adjudicated on together, the *forum concursus*; or that to which the defendant is personally subject, the *forum rei*. The last mentioned forum, in the Roman and derived laws, has always supposed that between the judge and his justiciable, if I may use a foreign term to express a foreign conception, there was a more or less durable tie, the precise nature of which, and the measure of its permanence, are connected with the questions of political nationality and domicile. Among the ancient principles of English law, on the other hand, there is found a competence based on the fact of the writ by which the action is commenced being served on the defendant within the territory. This may have been regarded as a case of the *forum rei*, the defendant's mere presence within the territory being supposed to make him personally subject to the jurisdiction, irrespective of any special ground, such as that of the *forum speciale obligationis*; but, if so, it was certainly a peculiar conception of the *forum rei*.

Supposing that on some such ground as those above mentioned the action is entertained by the national jurisdiction in which it is brought, the principal grounds for selecting a particular law to be applied in deciding it are analogous to those for selecting a jurisdiction. Thus we have the *lex situs*, *loci contractus*, *loci delicti commissi*, and *loci concursus*; and wherever the *forum rei* is understood as being based on a more or less durable tie between the judge and his justiciable, we also have the conception of a personal law. The latter was anciently the *lex domicilii*, and to a great extent is so still, but the modern tendency is to substitute political nationality for domicile as the test of personal law, so far as possible. Of course, as between two or more national jurisdictions comprised in one state, such as England, Scotland, and the province of Quebec, such a substitution is not possible, and there at least the *lex domicilii* must maintain its ground. Another law often invoked is the *lex loci actus*, that of the place where an instrument was executed, or where proceedings have been had under judicial or other public authority. And since validity is often claimed in one jurisdiction for judgments pronounced in another, by virtue both of the *lex loci actus* and, in matters of status, of the personal law, it follows that the question in what jurisdiction an action ought to be

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brought may be asked in two ways: first, in order to know what are the actions which a particular jurisdiction will entertain when they are brought in it, and secondly, in order to know when the judgment pronounced in an action will be allowed any force beyond the limits of the jurisdiction in which it was pronounced. Lastly, the court's own law, the *lex fori*, is a competitor always on the spot, and applicable when the claim of no other law is established, sometimes even applicable on positive grounds.

Such are the questions of private international law, and the various forums and laws which they bring into competition. Now since private international law is administered by national courts, it follows that each court must apply any solution of these questions which its own national law may be found to prescribe. And the national law is very likely to contain an answer to the question under what conditions an action is maintainable in its own courts, while it may probably be silent with regard to the law according to which any particular action is to be decided, or to the validity to be allowed to foreign judgments. What then is to be inferred from the silence of the national law on these topics? The inference that the national law itself must always be applied, and that no validity is to be allowed to foreign judgments, would have led to practical results so shocking to all notions of justice that it has never been drawn: it has been regularly assumed that the national law tacitly adopts some maxims according to which foreign laws and foreign judgments are sometimes admitted to be of force. The law of England is, or was, preeminently in the case here considered. Its statute book, and the writings of those of its earlier sages whose names are revered as those of the law itself, are almost entirely blank on the head of foreign laws and judgments; but maxims have been adopted by the courts by means of which an extensive and tolerably consistent jurisprudence has been built up. The value set in England on judicial precedent is such that this jurisprudence, so far as it is consistent, must now in its turn be considered as a part of the national law, and therefore binding on the courts unless and until the legislature shall alter it. But with a view to its completion, whether by legislative aid or by the further action of the

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courts, the questions, whence the maxims adopted in England were derived, and what was the justification for adopting them, are not yet of merely historical or speculative importance.

The maxims adopted in England on questions of private international law were derived from those which prevailed on the continent. The earliest channel through which they filtered into the insular system was that of the ecclesiastical and admiralty courts, which professedly administered laws of more than insular extension. Then, about the time of our Revolution, the increasing mercantile and political intercourse with the continent obliged our lawyers to renew their acquaintance with its legal literature, five centuries after Vacarius taught the Corpus Juris in England; and the views so imported bear traces of the fact that the Dutch was then the leading school, and perhaps also of the fact that Holland was the country with which we had the closest political connection. I do not know enough of the history of Scotch law to assert it, but probably the union with Scotland, coupled with the fact that it had been usual for Scotch advocates to complete their legal education in Holland, may have had some effect in the same direction. Now the leading features of the system which by this time had been elaborated on the continent were these.

Statutes which disposed about things were real, and such statutes, existing in the places where the things were situate, were to be applied, as the *lex situs*, even in other jurisdictions. So far as concerned movables, this was largely modified by the maxim *mobilia sequuntur personam*, which was opposed to such property being deemed to have a situation of its own.

Statutes which disposed about persons were personal, and such statutes, existing in the places where the persons were domiciled, were to be applied, as the *lex domicilii*, even in other jurisdictions. The chief application of this was to questions of status and capacity.

Statutes which were not clearly either real or personal were mixed, and effect might be given to them in other jurisdictions than those in which they existed, either on the ground of the *lex situs* or on that of the *lex domicilii*, according as it was thought

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that they approached more nearly in character to real or to personal statutes; or else questions not clearly referable either to the real or to the personal statute might be decided on one or other of certain maxims which stood rather outside the doctrine of statutes, namely:

The *lex loci contractus* governed obligations arising out of a contract;

The *lex loci actus* governed the forms of instruments, and the validity of proceedings had abroad under judicial or other public authority;

The *lex fori* governed the procedure in the action itself; and the same law, in its character of the *lex loci concursus*, governed questions arising out of the circumstance that several claims, possibly originating under different laws, have to be adjudicated on at once, such for example as the question of the ranking of creditors against a bankrupt's estate.

It must not be supposed that even on the continent the system thus sketched out was certain or coherent. As some among many examples of the vagueness which really beset it, there may be cited the endless discussions whether particular statutes were real or personal, or, if allowed to be mixed, whether they approached more nearly to real or to personal statutes; whether the *lex loci contractus* ought to be understood as the law of the place where a contract was entered into, or of that where it was to be performed; whether the prescription by which an obligation is extinguished ought to be measured by the *lex loci contractus*, as a limitation of the obligation itself, or by the *lex fori*, as the law of procedure determining the time for bringing an action on it; and, with regard to the *lex actus*, whether it was necessary to draw up instruments in the form prescribed by it, or whether an option as to the form of instruments was allowed between the *lex loci actus* and the law of the place where they were to operate.

As little must it be supposed that the system, such as it was, was imported wholesale into England. Certain parts of it, which suited the national temper or some peculiarity of English law, were eagerly seized on. Thus the principle of the *lex situs*, or of the real statute,

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was in harmony with the importance attached to landed property, and the estates and interests which English law permitted to be held in land were so peculiar that great confusion would have arisen if its tenure could have been interfered with by deeds in foreign form, or by matrimonial engagements tacitly entered into under and with reference to foreign laws. Hence the application of the *lex situs* to land received in England its utmost development, as against the *lex loci actus* and the *lex loci contractus*. On the other hand, the English courts have always been, and still are, extremely backward in admitting a personal law of status and capacity, dependent on domicile, doubtless because the personal forum, which lies at the root of personal law, was not conceived in England, as already mentioned, to depend so much on a durable tie between the judge and his justiciable as on the defendant's casual presence within the territory. And the principle of the *lex loci actus* for the forms of instruments was not only opposed in England by the considerations just mentioned with regard to land, but from another cause can scarcely be said to have been received at all. The institution of public notaries fell early in this country into great disuse, and deeds and wills were drawn in private, with such legal assistance as the parties might think fit to obtain. Hence it did not easily occur to the mind of an English lawyer that the necessity of recourse to a public officer, who would of course adopt the form of his own country, might make the forms of the *locus actus* unavoidable. It was only in 1861, by lord Kingsdown's Act, that the *lex loci actus* was admitted in England as a sufficient support for the formal validity of a will.

Such were the sources from which the English maxims on topics of private international law were derived. The question of the justification for admitting foreign laws and judgments, in accordance with these or any other maxims, confronts us at once with history and philosophy, with the nature of the obligations which courts of justice enforce, and with that element which is never to be disregarded in the criticism of human institutions, the course which things have actually taken.

Roman law, as handed down to us, contains little which belongs to

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our subject. When the prætor, under the republic, judged between citizens of those states which it gradually absorbed, his aim was not to lay down rules for the selection of the law of one of those states as applicable to the case before him, but to frame a body of law generally applicable in such cases by extracting the parts which the several national laws had in common. This was the *jus gentium*, which was afterwards identified with the *jus naturale*, and the Roman law itself was brought into increasing conformity with it by the efforts of successive generations of magistrates and jurisconsults. Still, differences of law continued to exist in the empire, and various provisions arising out of them were contained in the *edictum provinciale* and the treatises on it; but these almost wholly lost their interest when the decree of Caracalla extended the citizenship, and with it the law, of Rome, to all her free subjects, and only some fragments on the force of local observances were preserved in the pandects.

The conquest of Rome by the barbarians, and still more the mutual conquest of the barbarians by one another, filled every country with a new diversity of laws, and this time no attempt was made either to fuse them or to restore the supremacy of one. In one respect indeed the soil was more fitted than before for such an attempt, because a common christianity had destroyed the religious sanction which ancestral institutions possessed among the nations of antiquity, whether Greek, Latin or barbarian. But the proud and independent spirit of the Germans attached them as firmly to their laws as an exclusive religion would have done, while to the Roman provincial his law was the symbol of civilization, necessary for the preservation of what remained of it, and for the transaction of his daily affairs. Thus there arose a system of personal laws. Within each of the new kingdoms, even in the same city, Roman and Lombard, Frank, Burgundian, and Goth might all be found, each living under his own personal law, very much as the Englishman, Hindoo and Mahometan now live together in India under their respective laws. The general rule was, as it now is in India, that the law of the defendant governed; if an obligation could not be established against him by his own law, there was no

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other to which he was subject. But marriage was to be celebrated according to the law of the husband, and so strictly was this rule adhered to that wives who had been married by *their* law were dismissed at caprice, a practice to which, in the year 895, the Council of Tribur could oppose none but religious sanctions.* A thousand years before, the Roman prætor would have separated the intention in which the laws agreed from the ceremonies in which they differed, and would have held the marriage to be valid by the *jus gentium*. The German stranger who passed from one kingdom to another, if he did not belong to any of the races whose laws were recognised in his new abode, enjoyed the law of the race which was dominant there: they had the best claim to incorporate the new partner. The Roman stranger brought his own law with him, for it existed everywhere; and his too was the common law of all those classes who, from the exercise of any trade or industry, were likely to have dealings out of which the tie of legal obligation might arise between subjects of different kingdoms.

To the one law of Imperial Rome, and the distinct personal laws of the dark ages, distinct territorial laws began to succeed at the close of the latter period. These were not at first due to any legislation like that by which we now see great legal changes introduced over wide territories by centralized governments. The feudal castle and the civic belfry were the earliest fixed points round which the fluctuating elements of society crystallized, and in connection with which the sentiment of local attachment, of a common home, began to supersede that of race. The latter had in the long run been a disuniting sentiment. Less had been gained for peace and good will among men by the thought which tied Frank to Frank and Lombard to Lombard, over wider areas than a regular administration could then embrace, than had been lost by emphasizing the distinctions between those whom every day brought into mutual contact. Now at length men were to learn the strength and fitness of neighbourhood as a bond of union, but first they were to learn it on the scale of the smallest groups, from which, as rivalries were smoothed and

* Mansi, t. 18, col. 151. I have been directed to this example by Savigny, Gesch. des Röm. Rechts im. Mitt., vol. 1, § 46.

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communications improved, the great territorial aggregates of modern times might be built up. In the nineteenth century race has again been put forward as being rightfully the determining element in the political distribution of the world, but with a meaning essentially changed. The word *race* is now used in political discussion for any population distinguished by a common language or dialect, and by common traditions, habits of life and sentiments. The ethnologist however knows that these are just the points in which agreement and diversity depend much on political and geographical circumstances, and that they are therefore far from being sure indications of agreement or diversity in descent. To attach political importance to race in this sense is to pay due homage to the real unities which have resulted from facts and events, and more particularly to unity of language, which has derived quite a new significance from the growth of liberty, and the consequent growth of discussion, in speech and writing, as the main instrument of government. It is also a protest against the arbitrary grouping of living and feeling men, whether by the accidental results of conquest, or by the calculated fetters of scientific frontiers, which, when they deviate from the boundaries of language and sentiment, rarely confer a defensive strength corresponding to the augmented probability of attack which they bring with them. We must not indeed suppose that when Goth and Burgundian, Frank and Lombard, invaded the empire, each of those names described a race whose blood had been pure from the earliest times. They may have been aggregates formed by prior political and geographical conditions of which nothing is now known, just as the Roman provincials, from whom as well as from one another they were distinguished, were certainly political and geographical aggregates of very miscellaneous elements. If so, the origin of all these names was similar to that of many races of whom nineteenth century politics have much to say; but when they were insisted on as distinctions between those who had been spread over the same countries, race presented a very different aspect from that which it wears when the common country is not denied as the basis of national union, but it is merely sought to determine the limits of countries in the best possible accordance with the natural wishes of their inhabitants.

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Law then became territorial in connection with civic and feudal authority. As the distinctions of race wore out, there grew up both in town and country usages common to the inhabitants of certain districts, which were ultimately turned into laws, also of local extent, through the local jurisdictions undertaking to enforce them; and the free towns further passed statutes, which were applied to their respective districts by a conscious exercise of will. Thus, for the first time in any legal history of which we have detailed knowledge, the occasion for a system of private international law arose; and the choice of the word *statutes*, as the technical one in the nomenclature of real, personal, and mixed statutes, was suggested in the infancy of the system by the statutes of the imperial cities. The jurists who professed in the chairs of those cities adopted that name for their ordinances because in the Roman Law, of which the study was at this time revived, the name of *lex* was reserved for that which was expressly enacted by the highest authority, and the middle ages clung to the idea that the highest authority in Western Christendom was still represented by the Holy Roman Empire. But some curious argumentative shifts were resorted to, in order to justify the admission that the custumals and statutes had the force of *lex*. Thus, inasmuch as the Venetians made their wills with only two witnesses, while the Roman law required five, one doctor trusted that they had received some forgotten dispensation from the successors of Justinian; while another argued that since by the Roman law a parent could with two witnesses divide his property between his children, a city, which was the parent of her subjects, might authorize them to distribute their substance with no more elaborate formality.* When it is remembered that Venice, at the time these apologies were made for her, did not acknowledge the supremacy of the emperor, it will be understood how severely the difficulty of upholding the authority of the statutes must have been felt by the doctors. The judges of the different cities were probably not troubled by any such scruples, and at any rate would not have been suffered to allow their action to be impeded by them. For the custumals there was also another apology in vogue, which even to some of the judges who adminis-

* Bartolus, ad. Cod. 1, 1, 1.

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tered them may have seemed their true defence. It consisted in denying to them any force of their own, and regarding them as being still that out of which they had certainly arisen, usages to which men chose to conform. This of course was really an untenable doctrine, as soon as the usage was enforced in spite of an evident intention not to conform to it, but we shall hereafter see that it impressed its mark on private international law.

Of that branch of jurisprudence, the first methodical conception appears in the commentaries on the Corpus Juris, where it generally finds its place among the annotations on the first law of the first title of the code *de Summa Trinitate*, although there is no inducement to its insertion at that point beyond the word *volumus*, and the propriety of discussing the limits of laws in general in the commencement of a commentary on particular laws. There cannot well be a better example of the strength and weakness of mediæval habits of thought than is afforded by the commentaries on this law. The subtlety wasted in endless subdivisions, the earnestness worthy of a better cause, and the confusion which ultimately reigns in spite of the acuteness displayed, forcibly exemplify the disadvantages of the commentatorial method as compared with that of original treatises. Take, for instance, the headings of the commentary of Bartolus (born 1313, died 1356) on the law in question. First, *Relativum quis ponitur declarative, argumentative, augmentative, et restrictive;* next, a maxim in support of the dignity of the law, to which however this mode of treating it rather appears to run counter, *Lex non debet esse ludibrio.* In the tenth, we reach *Argumentum de perjuro ad hæreticum quando procedat*, and so on through fifty-one sections on a short law, including, *obiter*, a system of private international law, though of course that name did not then exist, on the word *volumus*. Lord Coke's expansion of one of Littleton's, &c.'s is nothing to the feats in the same line of the commentators, and still more of the glossatores, on the Corpus Juris.*

In these commentators several things may be noticed. First,

* In this and some other paragraphs of the present chapter I avail myself of some historical matter which, but not any criticism on my book, I contributed to the notice of the first edition in the *Law Magazine and Review*.

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they conceive the question of private international law as being that of determining the legitimate field of operation of each law, and not primarily as that of the conflict of laws having by possibility overlapping fields. This was due to the fact that the Roman law appeared everywhere in the background of the view, as the common law to which the statutes and custumals were exceptions, permitted by what was conceived as a still living imperial will. That will could not be in conflict with itself, and it must therefore have set some bounds, could they only be discovered, to the field within which it intended to permit the operation of each local provision. As another result of this mode of looking at the subject, the maxim that exceptions are to be construed strictly was always at hand, to limit the application of a local provision which for any reason was disliked. Secondly, the doctrines on the selection of a law were often deduced from doctrines relating to jurisdiction, in accordance with the maxim, *paria sunt forum alicubi sortiri et statutis ligari: si ibi forum, ergo et jus.* Hence, if it could be determined to what territorial jurisdiction any contention belonged directly or by the strict rule, the law of that jurisdiction was to be applied if incidentally, or by a permitted deviation from the strict rule, the matter arose in any other forum. And hence again the provisions contained in the Corpus Juris on the forum for each kind of action, and which in the empire of Justinian could not have contemplated a diversity in the laws of those forums, became available for determining the law to be selected. Thus statutes regulating the status and capacity of persons were applied to the justiciables of the forum where they existed, and to them only; and the *forum speciale obligationis* was very influential in the genesis of the maxim of the *lex loci contractus.* Thirdly, the personal statute, in its purest form, as affecting the status of persons, disposes, like the real statute, about a thing, although about an intangible thing; and the philosophy of the earlier middle ages greatly disposed the minds of the doctors to see a sacramental efficacy in both these classes, impressing the thing or person with a character which clung to it inalienably even in other jurisdictions, and in spite of the conflict of other considerations. Fourthly, as the divergences from the common Roman basis had not become very

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wide in Italy, to which country the doctors chiefly belonged, their writings are marked by a dearth of illustration; indeed it sometimes looks as if important distinctions had been suggested by logic, without the aid of experience at all.

The great Charles Dumoulin (Molinæus), in the middle of the sixteenth century, was one of the last jurists who wrote on this subject by way of commentary on the code *de Summa Trinitate*. As a Frenchman, he thought less of civic statutes, possessed of a binding force through some derivation of imperial will, than of the custumals of his country, and of the theory which treated them as usages to which men were presumed to conform. Also while the topics most discussed by his predecessors had been the solemnities of acts, and the laws respecting the capacities of persons and the destination of property, Dumoulin is fonder of considering cases arising out of contract. On both accounts his tendency was to seek in the circumstances a clue to the intention of the parties, and to allow to that intention, when discovered, a greater influence than to legal rules. This may be instanced by the doctrine, developed in his 53rd *consilium*, that where a marriage is solemnized without express contract, between persons domiciled within the territory governed by a custom, that custom receives a contractual force through tacit adoption, by which it applies even to the immovable property of the pair situate under another custom, contrary to the prevailing opinion in favour of the *lex situs* in such case. Henry Boich appears to have meant much the same thing when he said that a personal custom was one *per quam jus nascitur ex contractu*.*

The commentatorial method was still followed by d'Argentré, late in the sixteenth century, in his gloss on the 218th article of the custumal of Brittany, but after that time regular treatises became abundant. This change in literary form was due to the freer spirit which came in with the revival of letters, and to the accession of importance which the subject derived from increased divergency of laws and more frequent communication between distant places,

* Quoted by d'Argentré, Comm. in Brit. Leg., Art. 218, gl. 6, n. 14.

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partly also, it is probable, to the changed aspect which the subject bore in consequence of the more independent footing which nations had obtained with reference to each other. No living imperial will could any longer be regarded as maintaining a common law for Western Christendom, and permitting exceptions by way of statute or custumal. There were manifestly autonomous legislators side by side; it was necessary to ascertain not merely the expression of their will, but the limits of their respective authority, or, if that could not be done, then to lay down rules by which the conflict of their authority might be determined; and for this, a gloss on any expression of the will of one of them was scarcely the fitting occasion. Grotius, in his famous treatise *De Jure Belli ac Pacis*, was the first who attempted to solve these questions from the new point of view. The general nature of his system, with his application of its principles to our subject, was as follows.

The highest degree of approval is merited by human actions when they conform to counsels of perfection, *consilia honesta quidem sed non obligantia.* Contrasted with this is *rectum*, the conduct to which men are obliged, and to which correspond *jus* and *lex*, each taken in the largest sense, and, when so taken, synonymous. *Jus* in a narrower sense, and *justum*, correspond to *justitia*, which is only one of the many virtues the observance of which makes up *rectum*. *Jus* in the larger sense may be divided into *naturale* and *voluntarium*. (I. 1. 9.) *Jus naturale* is the dictate of reason, pointing out that an action must have been forbidden or ordered by God. (I. 1. 10.) *Jus voluntarium* is either *divinum* or *humanum*, the former being the law which we learn from revelation to have been ordained by God, and the latter being again divided into *civile* and *gentium*. *Jus civile* is the law within a state, being either that of the state, or at least existing in subordination to the state, as the precepts of fathers and masters. *Jus gentium* is that which derives its obligatory force from the will either of all nations, or of all the nations inhabiting a certain part of the globe. (I. 1. 13–15.) Hence it is evident that when Grotius makes obligation the distinguishing mark between *rectum* and *consilia honesta*, he understands obligation as meaning that the rule from time to time in question has

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been imposed by some will, divine or human. What is not clear in his system is how reason, approving or disapproving of two actions, can distinguish between one of them, as ordered or forbidden by God, and the other, as merely the subject of a counsel of perfection. In other words, he fails to shew any base for a conception of *rectum*, as covering a definite field, larger than is covered by human or revealed law, but smaller than that over which the moral sentiment of approval or disapproval extends. An intermediate but indefinite field, within which the moral censure passes through various degrees of strength, is of course conceivable enough; but Grotius regards his *jus naturale* as definite and ascertainable.

Another division of *jus* is into what is properly or strictly, and what is improperly or loosely, so called. To strict *jus* corresponds the virtue *justitia expletrix*, which Aristotle called *συναλλακτική* and *ἐπανορθωτική*, the latter term being the better, since the matter with which this justice is concerned is not limited to the fulfilment of contract. It consists in suffering another to possess what is already his, or making it good to him, which includes the duties of not being enriched out of another's property, of performing promises, of repairing damage done by our fault, and of submitting to due punishment at the hands of our fellow men. And the rights which correspond to it, the name for which is *facultas*, may belong to a private person, as right of property, right under a contract, right of a father over a child; or they may belong to a state, or a king as representing the state, as in the case of eminent domain. To the looser *jus* corresponds the virtue *justitia attributrix*, which Aristotle called *διανεμητική*, and it consists in "a prudent dispensation of what is proper for each man or group of men, as in preferring the wiser to the less wise, the neighbour to the stranger, the poor to the rich, according to the nature of each case." For the rights which correspond to it the nature is *aptitudo*, called by Aristotle *ἀξία*, or what one is worthy of. *Jus civile* often derives its principles of legislation from attributive justice, but not always; for example, it follows expletive justice when it ordains the repayment of what individuals have spent for the public benefit. The two kinds are also mixed in the actions of private persons;

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thus there is room for attributive justice in giving a legacy. (Prolegomena, 8, 10; lib. I. 1. 5–8.)

The mutual relations of the two modes of dividing *jus* explained in the last two paragraphs have not been worked out by Grotius with all desirable clearness. The looser or attributive *jus* is to be ascertained by "the judgment with which men are endowed above other creatures for estimating what pleases or hurts, not only at the moment but afterwards, and what may lead to either result" (Pr. 9). This test is not to be called *utilitas*, which term Grotius understood in a narrower sense, so as to exclude the satisfaction of the social appetite, when unconnected with any other want (Pr. 16, 57). The law which satisfies this test is the dictate of right reason, and a correct inference from the principles of nature, and it certainly has much to do with the *jus naturale* (Pr. 40, 41). But not the less does the stricter and expletive *jus* also belong to the natural division, since that division often draws the appropriate consequences from a state of facts which has been introduced by human will. Thus property, as it now exists, was introducod by human will, but since it exists theft is forbidden by *jus naturale* (I. 1. 10).

We are not now concerned with the system of public international law which Grotius erected within this framework. For our subject, his most important utterance is in lib. 2, c. 11, s. 5. There, after mentioning the diversity of national laws on the age of majority, he says that "these have nothing to do with the law of nature and the *jus gentium*, except that it is natural to observe them in the places where they prevail. Wherefore even if a foreigner contracts with a citizen, he will be bound by those laws; because he who contracts in any place becomes a temporary subject to the laws of that place. It will be quite otherwise if the contract be made at sea, or in an unoccupied island, or by letter between persons in different countries. For such contracts are governed by the law of nature alone, as also the contracts of the chief rulers of states, made by them in that character; for when such persons deal in their private capacity, even laws for the avoidance of acts may be applied in their favour, though not penally against them." It is a pity that Grotius did not explain his statement that it is natural to observe laws in the places where

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they prevail, when he was about to draw from it a conclusion so unusual both in theory and in practice as that the age of majority for contracting should be determined by the *lex loci contractus* and not by the personal statute. But for the sentence which immediately follows, it might have been supposed that he assumed the contract would be adjudicated on in the country where it was made, and that what he considered to be natural was that the judges of that country should observe their own law, in accordance with the maxim *si ibi forum ergo et jus*. When however he discussed the law to be applied to contracts made at sea, or by letters interchanged by persons in different countries, he must have contemplated that such contracts would come before some forum, and the maxim referred to might have pointed to the national law of the defendant, but certainly not to the law of nature. Grotius cannot therefore have been thinking of the judges observing their own law, and what he says about temporary subjection may suggest that his meaning was this. Obligation under a national law arises from the will which imposes that law; that will is territorial in its field of operation; it is therefore natural, that is to say the dictate of reason, that the obligation which arises on the occasion of an act done within a given territory should be measured by the law in which the will reigning within the territory has expressed itself. Such a line of argument would be consistent with emancipating contracts made at sea, or on an unoccupied island, from all national law, but with regard to contracts made by letter it would rather lead to measuring the obligation of each party by the national law under which he wrote. Perfect consistency is however scarcely obtainable from the passage, and the explanation here given is in accordance with the eagerness with which the territorial principle was seized on, when the great states began to stand out in clear shape after the misty vision of a continuing political unity in Western Christendom. Of course the advocates of the personal statute would retort that the will which imposes a national law within territorial limits does not necessarily decree the application of that law to all the cases there arising, when great inconvenience would result from so doing.

And certainly no system could lead to greater inconvenience

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than one which should exclude the personal statute from its influence on capacity, and hand over all commercial transactions, in which the parties do not happen to be within the same jurisdiction at the moment of contracting, to the sway of a vague law of nature, which can amount in practice to little else than the judge's private opinion of what is equitable. It is not therefore to be wondered at that the particular conclusions of Grotius on our subject remained without much effect, but the spirit in which he approached it worked, and the result followed which is inevitable whenever the maxims of territorial sovereignty and the temporary subjection of passing foreigners are put forward with any strength, in relation to transactions which by their scope or by the persons who enter into them are connected with more territories than one. The idea of determining the proper field of each law gave way to that of arbitrating on a conflict between laws, an idea which presupposes some imperfection in the definition of their respective fields, since otherwise a conflict would be impossible. The most important among the treatises of the seventeenth century are those of Rodenburg, *De jure quod oritur ex statutorum vel consuetudinum diversitate;* of Paul Voet, *De statutis eorumque concursu;* of Huber, *De conflictu legum;* and of Hertius, *De collisione legum;* and conflict is avowed in the last three of these titles. Huber indeed asserts formally that, by reason of the territorial character of sovereignty, the law of the land is always primarily obligatory, subject only to a comity by which sovereigns admit foreign laws to operate within their territories. Such comity would be a positive institution, analogous to the *jus gentium*, and for the proof of the rules composing it an appeal could only be made to general reception, real or supposed. In fact, as we have seen, rules really of general reception did not cover the subject, but authors clung to the belief that they did so, partly because in their absence there seemed to be no mode of deciding any particular cases, and partly because the belief in a universal science of law had survived from the days when men had believed in a universal law. Hence arose the practice of laboriously collecting authorities, as testimonies to the general reception of certain maxims, with the result however of

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betraying more clearly the vagueness and uncertainty which beset the matter.

The critical spirit of the nineteenth century has not been content with so barren a method, but this historical sketch has now reached the point at which the English courts completed the importation of their maxims on what is now called private international law, and we can appreciate the justification they felt for so doing. Disciples of Huber, who has been oftener quoted in England and the United States than on the continent of Europe, they considered that in not deciding every case by the strict law of the land they, in the name of that law, were making a concession, but one which was dictated as well by a convenience amounting to necessity, as by deference to a science of law, from which they conceived that they drew the required maxims. That science they probably regarded as so elementary that the law of England, whether common or statute law, must be taken to have foreseen and assumed that its own interpretation and application would be subject to it. They probably did not reflect how far that science, so far as it had a real existence, arose from generalizing certain parts of the Roman law, of which the law of England had always been very jealous. It came to them in the form of maxims claiming universal recognition, and as soon as any such maxim had been accepted by the courts of this country, the practice of relying on the precedents of those courts assisted in preventing a further investigation which might have seriously damaged the claim to universality. And so far as the courts may still be called on to complete the system thus established, or as parliament may think fit to modify it, no way more consonant to its original spirit can be found for either than to adopt those rules which in truth are now most widely received, even, so far as the aid of parliament be given, although they should differ from the rules which were imported in former days, under the impression, correct or otherwise, that they were then the most prevalent.

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CHAPTER II.

PRESENT STATE OF THE SUBJECT ON THE CONTINENT.

In the course of the preceding introduction, a very summary view of the maxims of private international law has been given. The ultimate scope of this work is to present in detail the maxims which are received on the subject in England, and the applications which are there made of them; but the next step will be to present with intermediate fulness the maxims which are now most widely received on the continent of Europe. A general review of the present condition of the subject would in any case have been desirable, before entering on details many of which, in whatever order they are taken, must require for their understanding some notions about what is to follow; and by connecting such general review with the continent, the reader will be put in possession of the matter which, according to the conclusion arrived at in the introduction, ought to exercise the most important influence on the settlement of those points which remain to be settled in England.

The civil code adopted in 1865 for the kingdom of Italy, and operative there from 1st January 1866, is fuller on private international law, as well as more recent, than the code of any other country of equal importance. I shall therefore take it as the standard, translating all those of its articles which relate to the subject, and comparing them with such provisions as are contained in the Prussian code of 1794, the French code (Napoleon) of 1803, and the Austrian code of 1811, operative from 1st January 1812.

Status and Capacity.

The status and capacity of persons, and their family relations, are governed by the law of the nation to which they belong. Italian Code, Preliminary Article 6.

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We have seen in the introduction that the older criterion of the personal statute was domicile: the statute governed the status and capacity of the persons domiciled within its territory. The foundation of this, as we also saw, was jurisdiction: as to the status and capacity of the justiciable, there was nothing to set against the presumption which existed in favour of the law of the court. Now under the feudal principle of homage, the man was justiciable in the court of his lord; but when this principle gave place to views of jurisdiction drawn from the study of the Roman law, the Roman notion of *domicilium* revived, as the instrument for subjecting a person to the justice of a particular locality. It is true that the Roman law knew two sources of jurisdiction over the person, *origo*, or citizenship, as well as *domicilium*. But in the Corpus Juris the *forum originis* is but little mentioned, for which circumstance Savigny accounts as follows. "In the first place, that rule" [the *forum originis*] "had complete application only in Italy, not in the provinces, in which there were no municipal magistrates with jurisdiction. Here therefore *origo* could found no jurisdiction, while on the contrary the abstract notion of domicile was just as applicable to the territory of a province, and therefore to the jurisdiction of the imperial governor, as to the territory of a particular town. But several of the passages cited expressly speak of the provinces only, and others may also have spoken of them although in their present form it is not apparent. In the second place, perhaps, the application of the *forum originis* to one who had *origo* and *domicilium* in two different municipalities was always limited to the case in which he happened to be found in the town to which he belonged by *origo*. But even if such a restrictive rule of law had not existed, the plaintiff must still, for his own interest, have preferred the *forum domicilii*, because the defendant was more easily and conveniently reached in the place of his domicile." * Very naturally then the *forum originis* fell into a desuetude from which the revived study of the Roman law did not resuscitate it, nor was there anything to suggest the establishment of a new personal jurisdiction founded on

* Syst. d. heut. Röm. rechts, § 355; translation of Mr. Guthrie [Savigny on the Conflict of Laws, by Guthrie], p. 68.

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political nationality, and therefore analogous to *origo*. So long indeed as the Holy Roman empire retained even the most shadowy claim to universality, its jurists were not likely to strike out any such conception; and hence, in Germany and Italy, the personal statute was interpreted as resting on a base of domicile, transferable with a freedom which the Roman doctrine, that *domicilium re et facto transfertur*,* protected from the fetters that allegiance might have imposed on the action of one who for the purposes of private law was *sui juris*.

In France however the reception of domicile as the criterion of the personal statute was qualified by a very limited reference to political conditions, not indeed through any reintroduction of *origo* as a ground of jurisdiction, but through a jealousy of *domicilium* as such ground, when by any possibility it might lead to consequences hurtful to Frenchmen. France attained early to the consciousness of a political unity within herself, marking her off from all foreign countries, the empire included, and which led, long before the consolidation of the royal power under Lewis the Eleventh, to certain peculiarities in her jurisprudence. The Roman notion of *domicilium* was revived as in the empire, so that a Frenchman could not be sued for a personal matter except before the judge of his domicile; but the foreigner (*aubain*), being in France with a residence there short of domicile, was not allowed, when sued by a Frenchman, to plead that his proper judge was the judge of a foreign domicile. His only protection was that the French plaintiff could not bring him before any tribunal he chose, but only before that of his actual residence. Also a foreign judgment had the force of *res judicata* in France when pronounced against a foreigner, but by the ordinance of 1629, Art. 121, a Frenchman could again dispute the merits of the cause before a French tribunal. Hence the personal statute of a Frenchman was that of his French domicile, and if he acquired a foreign domicile, neither a judgment there pronounced, nor the statute of that place operating through the medium of such a judgment, could affect his status or capacity in France. But the foreigner was bound as to his status and capacity by the *res judicata*, and therefore by the statute, of

* Dig., 50, 1, 20.

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his foreign domicile, though it is more than probable that, if sued in France by a Frenchman for matters transacted in France, he would not have been allowed to defend himself by that statute.* Suppose however that the foreigner established in France, not merely a simple residence, but such a residence as satisfied the Roman notion of *domicilium;* could this be counted in his favour? The French legists, either by a misconception or through a desire to justify the inequitable *droit d'aubaine*, seized on the Roman distinction between *jus civile* and *jus gentium*, and held that foreigners enjoyed the latter in France, but not the former. Now it has been already noticed that the transfer of domicile was in Roman ideas a question of fact, *domicilium re et facto transfertur:* therefore it did not depend on the *jus civile:* therefore a foreigner was allowed to establish his domicile in France, with the effect of submitting his status and general capacity to the law of that domicile, his particular rights remaining limited by his exclusion from those which arose out of the *jus civile*, as succession to property on death, its transmission by will, the *patria potestas*, and adoption.† This exclusion is often spoken of as incapacity, and not without etymological accuracy; but questions about it must be distinguished from those about the general capacity which is the subject of this section. A Frenchman, as a minor, may have wanted the latter capacity, while enjoying rights, for instance, of succession: a foreigner in France may have been *sui juris*, while deprived of such rights.

To come now to the modern law of France, the Code Napoleon says:—

> The laws concerning the status and capacity of persons govern Frenchmen, even though residing in foreign countries. Art. 3.

This is the natural outcome of the ancient French principles just explained. The internal differences of law, with regard to which the precise domicile within France was important, have disappeared, but the political nationality of a Frenchman remains, to govern his civil relations even abroad. The same code says:

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* See Demangeat, Histoire de la condition civile des étrangers en France, p. 117–121.

† Demangeat, lib. cit., p. 123–155.

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The foreigner who may have been admitted by the authority of the government to establish his domicile in France shall enjoy there all civil rights, so long as he continues to reside there. Art. 13.

I understand the general interpretation of this article to be in accordance with its obvious meaning, namely that it refers to questions of right and not to those of capacity, distinguished as at the end of the last paragraph. In other terms, it repeals the exclusion of the foreigner who has established his domicile in France with the authority of the government from the rights given by the *jus civile*, the difference between which and the *jus gentium* is still sometimes noticed by French lawyers even under the empire of the code, but it neither says nor implies any thing as to the law by which the status and general capacity of any foreigner is to be determined. As to that matter, the prevailing opinion is that a silent revolution has been wrought by Art. 8, and that as the status and capacity of Frenchmen are to be determined by French law, so, by analogy, the status and capacity of foreigners, whether they have established a domicile in France with the authority of the government or not, must be determined by the law of their political country. And even those who adhere to domicile, as the criterion for the personal law of foreigners, generally admit that a domicile established in France without the authority of the government can now no longer be regarded as sufficient for that purpose, so that the only question about which there appears to be still any practical doubt relates to the personal condition of those who have established a domicile in France with such authority. It remains to observe that the French courts do not generally allow a Frenchman to suffer from the incapacity, by his personal law, of a foreigner who contracts in France, when the foreigner would have been capable by French law, and the Frenchman was in good faith ignorant of his incapacity.* So much still remains of the ancient practice, which in no case permitted a foreigner contracting in France to defend himself by his personal statute against a French plaintiff.

The Prussian code contains the following provisions.

* Demangeat, lib. cit., p. 373.

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Introduction, § 23. The status and capacity of a person are to be judged according to the law of the jurisdiction in which he is domiciled.

§ 24. One's merely quitting his jurisdiction, an intention to choose another domicile not yet appearing with certainty, does not alter his personal rights and obligations.

§ 25. So long as one has no determinate domicile, his personal rights and obligations are to be judged according to the place of his origin.

§ 26. If the place of his extraction is unknown, or not within the king's dominions, either the general law of the country [that is, this code, so called.—J. W.], or the particular law of his residence from time to time, is to be applied, according as the one or the other is more favourable to the validity of what he does.

§ 27. If any one has a double domicile, his capacity is to be judged according to the law of that one of the two jurisdictions which is most favourable to the validity of the matter in question.

§ 34. Subjects of foreign states, who live or carry on business in this country, must be judged as well as others according to the foregoing determinations.

§ 35. But a foreigner who contracts in this country about things situate in it is to be judged, as to his capacity, according to that law which is most favourable to the validity of the matter in question.

Hence, as might have been expected, the Prussian code adheres more closely than the law of France to domicile as the criterion of the personal statute. It makes no mention of political nationality, except to preclude any exemption of foreigners from the rules which it lays down. The extraction of which it speaks is not the Roman *origo*, but merely the domicile of origin which is attributed to every one before he is of age to choose for himself, usually the domicile of his father, and the domicile with which it is contrasted is merely that which is afterwards freely chosen. But the Prussian law makes a wider breach than the French in the principle of the personal statute, whatever be its criterion, since in cases of very frequent occurrence it determines the capacity by the law most favourable to it, without limitation to the necessity of protecting a subject who has contracted in good faith.

The Austrian code contains the following provisions.

§ 4. The civil laws bind all the citizens of the dominions for which they are promulgated. Also citizens remain bound by these laws in what they do out of the dominions of the state, so far as their personal capacity to do it is restricted by such laws, and as what they so do may produce legal consequences in these countries. How far foreigners are bound by these laws will be determined in the following chapter. [The reference is to §§ 34, 35, here following.—J. W.]

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§ 34. The personal capacity of a foreigner is in general to be judged according to the law of the place to which he is subject by reason of his domicile, or, if he has no domicile of his own, by reason of his birth; that is to say, so far as this code does not lay down a different rule for the particular case.

§ 35. A thing done by a foreigner within this state, by which he confers rights on others without their being reciprocally bound, is to be judged either by this code or by the law to which the foreigner is subject, according as the one or the other is the more favourable to its validity.

The birth mentioned in § 34, like the extraction of the Prussian code, is the domicile of origin. Thus the Austrian code, like the Prussian, gives domicile as the general criterion for the personal statute, but, like the French code, it claims to bind the Austrian subject universally by its provisions on personal capacity, when his Austrian connection is with any province of the empire for which the code may have been promulgated.

During the half century which intervened between the enactment of the Austrian and Italian codes, a new factor, nationality, was introduced into European politics. Any body of people, occupying a certain territory or forming the majority in such a territory, and united among themselves and differentiated from their neighbours by language, customs, and actual or imagined ties of race, claimed a separate political development. The unity and independence of Italy was the most striking and important, and at the same time the best justified, result of this tendency; and both in preparing for it, and in the glow of national feeling which succeeded its accomplishment, the Italian jurists were foremost in developing the tendency on its theoretical side. Viewed on that side, the social characteristics of what was called a nationality, including the laws which moulded or expressed those characteristics, were not made exclusively the antecedents, and the political unity and autonomy conclusively the consequent. The nationality was regarded as the product of a living force, which showed itself, or tended to do so, at once in the political and social spheres, so that in a normal state of things the political organization might as well serve for the index to that which should exist for private law, as the social organization might serve for the index to the political. The civil code of Italy was drawn up under the influence of these principles, and when

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it says, in the article placed at the head of this section, that the status and capacity of persons are governed by the law of the nation to which they belong, it declares itself, for the criterion of the personal statute, against domicile, and in favour of the nationality as developed ideally, and as far as possible also in fact, by political relations. Thus, according to Italian legislation, the personal law of an Italian subject or a French citizen is Italian or French, irrespective of his domicile, and the latter element can only be invoked to determine the personal law in such cases as those of England and Scotland, countries legally distinct but politically one. In this the Italian code is at least more distinct than the Code Napoleon, if indeed the latter was really intended to proceed quite so far in the same direction. But to point for the origin of that direction to France or to the doctrine of nationality is to point to two sources which are not essentially diverse. We have seen that the ancient French maxims which in due time determined the line taken on this subject by the Code Napoleon arose from the sentiment, first experienced in France of all great continental countries, of an intimate connection between the political and the social or jural aspects of national life; and the modern doctrine of nationality is at bottom this sentiment, coupled, it may be hoped only for a time, with somewhat fantastic theories as to the influence of race on national life.

Property not considered in special connection with a person.

Movables are subject to the law of the proprietor's nation, except so far as the law of the country where they are found may contain contrary dispositions. Immovables are subject to the laws of the place where they are situate. Italian Code, Preliminary Article 7.

There are certain cases, for example marriage and succession on death, in which masses composed of various kinds of property, *universitates juris*, are considered together, in connection with some person who forms the only tie between their elements. These cases, which are sometimes described as universal assignments, a term not always strictly appropriate, are those which, in the rubric at the head of this section, it is intended to distinguish from the considera-

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tion of a particular piece of property with no further reference to any person than property must always involve. The Italian code, in the passage above cited, does not take this distinction; but since succession on death is treated of in the articles which will be cited in the next section, and other so-called universal assignments rather attach themselves to other articles, the present article may be considered only in relation to particular property. The second part of it simply follows the old maxim that the real statute, or *lex situs*, governs immovables. The first part deals with a question on which there had never been a satisfactory general understanding, namely whether the real statute also governs particular property in movables, leaving the maxim *mobilia sequuntur personam* to operate only in universal assignments, in which its operation is undoubted, or whether the latter maxim also comprises particular property. This question the text solves by taking *mobilia sequuntur personam* as the rule, subject to an exception where the *lex situs* contains contrary provisions. Practically, this is much the same thing as adopting the *lex situs* for particular property in movables, but the peculiar form of the article was no doubt determined by the desire of the Italian legislator to uphold nationality, so far as practicable, as the governing principle of private international law.

The Prussian code lays down the doctrine *mobilia sequuntur personam* without taking any notice of the distinction between universal and particular assignments, and therefore so as to apply it to both. Its articles on the subject, together with that which affirms the real statute for immovable property, are as follows.

Introduction, § 28. A person's movable property is to be judged according to the law of his ordinary jurisdiction, without reference to his residence at the moment. (§ 23 and following.*)

§ 29. In the case of a double jurisdiction, the law of the place where the thing is situate has the preference.

§ 30. But if, in the case of § 29, the movable property, at the time of the transaction relating to it, is at a third place, the law of that place is to be applied which approaches nearest to the common law of the Prussian states [that is, to this code. J. W.].

* This reference is made in the Prussian code itself. If the reader will turn back to p. 29, he will see that its effect is to identify the ordinary jurisdiction with the domicile.

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§ 31. The movable property of a person who has no determinate domicile is to be judged according to the law of his residence from time to time, but with regard to his personal status.

§ 32. The law of the jurisdiction in which it is situate applies to immovable property, without regard to the owner's person.

The Code Napoleon is silent as to the law applying to movable property, but says:

Immovables, even those possessed by foreigners, are governed by the law of France. Art. 3.

The Austrian code contains nothing on the subject of this section.

Property considered in special connection with a person.

Nevertheless, successions, whether by destination of law or under a will, and with regard both to the order of succession, to the measure of the rights of succession, and to the intrinsic validity of dispositions, are governed by the national law of the person whose inheritance is in question, of whatever kind is the property, and in whatever country it is situate. Italian Code, Preliminary Article 8.

. . . . The substance and effects of donations and last wills are considered to be governed by the national law of the persons who make the dispositions. . . . . It. Co., Pr. Art. 9.

Here the personal statute is laid down as governing succession on death, intestate or testamentary, with an express inclusion of immovable property, which forms indeed the only novelty of the clauses. The Austrian code must be understood as adopting by its silence the old rule, which limited to movable property the operation of the personal statute in cases of succession; and the French and Prussian codes place themselves more distinctly on the same side, since in their articles affirming the real statute for immovables, which are quoted in the last section, the phrases "without regard to the owner's person," and "even those possessed by foreigners," pointedly include the cases in which the foreign personality of the owner would make a difference if the property were movable. Donations are mentioned in Art. 9, above, because restrictions on the testamentary power are commonly reinforced by restrictions on the power to defeat the lawful heirs by donations *inter vivos*.

There can be no doubt but that the Italian legislator intended the

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effect of marriage on property to be governed by a similar rule to that which he has expressed for the case of succession. That he has not expressed the rule for the former case may be due to an assumption that succession would be treated as a typical instance for *universitates juris*, or perhaps, and indeed more probably, to his considering that the effect of marriage on property comes under the head of contract, even where the contract, so far as regards property, is tacit. The subject shall therefore be postponed till the clause on the substance and effects of contracts is reached.

Forms of acts, other than judicial ones.

The external forms both of acts *inter vivos* and of last wills are determined by the law of the place where they are made. Nevertheless, it is optional for persons making dispositions or contracts to follow the forms of their national law, provided such law be common to all the parties. Italian Code, Preliminary Article 9.

This clause decides an old doubt on the continent, namely whether the forms of the *lex loci actus* are necessary, or may be waived, where it is possible so to do, in favour of other forms specially appropriate to the matter, such as, for a contract, the forms of the place where it is intended to be performed, and for a will, those of the testator's personal statute, or of the place where the immovable property bequeathed is situate. The more common opinion is in favour of the latter doctrine, and the Code Napoleon does not even always permit the forms of the *locus actus* to be employed, for it says:

A Frenchman who happens to be in a foreign country may make his testamentary dispositions by act under private signature, as prescribed in Art. 970 [this must be a holograph will. J. W.], or by *acte authentique*, with the forms used in the place where the act is passed. Art. 999.

A Frenchman is not therefore free to make his will in any private form which the *lex loci actus* may permit. In England, as has been noticed in the introduction, a sharp line has not been drawn between the law affecting the form of acts and that affecting their substance, and until the legislation of 1861 wills of movables were required to be made in the form prescribed by the law of the testator's domicile,

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while wills of English real property are still required to be made in English form.

The Prussian code contains this article:

Introduction, § 33. Provincial laws and statutes, which determine the external ceremonies of any matter, are valid only for those matters which are transacted within the jurisdiction for which the law has been enacted, by persons subject to that jurisdiction.

Such a provision might seem to refuse the power of employing the forms of the *lex loci actus* to all but the domiciled subjects of that law. It will be observed however that it only applies to provincial laws existing within the Prussian dominions, and it is therefore not in truth a rule of private international law, but an expression of the will of the Prussian sovereign as to the respective limits of his general code and the particular laws of his provinces. On what is really the subject of the present section the Prussian code disposes as follows.

Part 1, Title 5, § 111. The form of a contract is to be judged according to the law of the place where it was concluded.

§ 112. When a formal contract is made *inter absentes*, its form is to be judged according to the law of the place from which the instrument is dated.

§ 113. But when a contract is made *inter absentes* by letters, no formal instrument being executed, and the legal forms differ in the domiciles (*) of the parties, the validity of the form is to be judged according to the law of the place most favourable to it.

§ 114. The same holds when a contract is dated from several places which have different laws as to its form.

§ 115. In all cases in which immovables, the property, possession, or enjoyment of them, are the subject of a contract, the law of the place where the immovable is situate must be observed as to the form.

§ 148. When contracts about corporeal movables are made by word of mouth at a foreign place where such contracts are good without distinction, the want of writing cannot be pleaded in the courts of this country.

Intrinsic validity and effects of contracts.

[The substance and effects of donations and last wills are considered to be governed by the national law of the persons who make the dispositions.] The substance and effects of obligations are considered to be governed by the law

* The word is *wohnort*, between which and *wohnsitz*, the usual word for domicile, Savigny does not admit a difference in meaning. Syst. d. heut. Röm. rechts, § 353; Guthrie's translation, p. 53, note *a*.

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of the place in which the acts were made, or, if the parties contracting are foreigners and belong to the same nation, by their national law. This is subject, in every case, to the exception of a different intention being shewn. Italian Code, Preliminary Article 9.

In order to show the mode in which the subject is treated in the Italian code, I have repeated here, in the place which it occupies in the original, the clause about donations and last wills which I have already taken in connection with the article on successions. With regard to the substance and effects of obligations, the chief discussion has been whether they are to be governed by the law of the place where the contract is made, *lex loci celebrati contractus*, or by that of the place where it is to be performed, often called, from a special though very common case, *lex loci solutionis*. The term *lex loci contractus* is sometimes used to include both, though it more properly describes the former. The importance of the distinction is much smaller than it would seem to be at first sight, because it is admitted on all hands that when persons *sui juris* contract with one another, their intention is the main thing to look to. The Italian article decides for the *lex loci celebrati contractus* as the rule, while taking full note of the paramount importance of the parties' intention. It also varies the rule itself, in favour of the personal law of compatriots contracting abroad; and certainly there is a much stronger presumption that in such a case the home law was tacitly referred to, than the law of the place where the contract happened to be made. But this part of the clause is specially important with regard to the effect of marriage on property, the consideration of which was postponed in order that it might be taken in connection with it.

The matrimonial domicile is that in which, at the time of the marriage, the consorts expect and intend to live together. It will therefore be in general the domicile of the husband at the time of the marriage, though perhaps, if it were agreed between the parties that the husband should adopt another domicile immediately after the celebration, and he adopted it accordingly, such agreed domicile might be considered the matrimonial domicile. Now it has been generally held that the law of the matrimonial domicile governs, at least in the first instance, the effect of the marriage on the movable

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property of a couple who marry without express contract; but it is among the moot points of private international law whether it should continue to do so after a change of domicile, and whether, if the law of the new domicile operates at all, it should govern all the movable property of the consorts, or only the portion acquired after the change. It is also a moot point whether the law of the domicile has any effect on the immovable property of the consorts, or whether this is left to the operation of the *lex situs*. Those who teach that the law of the matrimonial domicile is introduced by a tacit agreement between the consorts naturally extend it to immovables, with regard to which there is quite as much reason for inferring an agreement as with regard to movables: they also naturally repel any operation of the law of a substituted domicile, which, as it could not have been foreseen, could not have been comprised in the agreement. Those on the other hand who, instead of inferring intention, seek in the absence of express contract to base the decision on positive rule, generally repel any operation of the law of the matrimonial domicile on immovables, because they are led to that law by the maxim *mobilia sequuntur personam;* and their principles are not without a tendency to let in the law of a new domicile, and this for the movables acquired as well before as after the change. The exclusion of immovables from the operation of the matrimonial law of the domicile prevailed in the middle ages, and is still maintained in England. How the system of implied contract arose, especially in France, has been glanced at in the introduction. All that needs here be added is that, since agreements belonged to the *jus gentium* and not to the *jus civile*, the foreigner domiciled in France was capable of them, and, on his marriage, it was generally held, on the ground of implied contract, that community did or did not arise between him and his wife, according to the law or custom of his French domicile.* Since the enactment of the Code Napoleon, it is doubtful whether the matrimonial law of property in the case of a foreigner domiciled in France, either with or without the authority of the government, is that of France, or that of his political nationality.†

* Demangeat, lib. cit., p. 153–5.

† See Journal du Droit Int. Privé, t. 2, p. 425; t. 5, p. 596.

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It can scarcely be doubted that, in the view of the Italian code, the effect of marriage on the property of the consorts is to be determined, in the absence of any express contract, on the ground of an implied one, by the personal law of the husband, for immovables as well as for movables, and for property acquired after as well as before a change of domicile. Indeed this was probably the instance which the framers of the code had chiefly in mind, when they laid down the common national law of two foreigners contracting, as the *primâ facie* indication of their intention with regard to the substance and effects of obligations. The wife, even were her nationality different before the marriage, would naturally be treated for this purpose as having the same law with her husband, whose nationality she acquires by the marriage.

The Austrian Code has these provisions.

§ 36. When a foreigner enters in this country into a transaction with a citizen from which reciprocal obligations arise, such transaction is to be judged without exception according to this code: but when he contracts with another foreigner, the transaction is only to be judged according to this code when it is not proved that another law was contemplated at the time of the contract.

§ 37. When foreigners enter into transactions abroad, either with foreigners or with subjects of this state, such a transaction is to be judged according to the law of the place where it was concluded, so far as it is not apparent that it was based on another law at the time of concluding it, and the provision above contained in § 4 [see p. 29. J. W.] does not oppose.

Judicial Proceedings.

1. Competence and forms of procedure are governed by the law of the place where the court sits.

2. The means of proving obligations are determined by the laws of the place where the act was made.

3. Judgments pronounced in civil matters by foreign authorities shall receive execution in the kingdom when they have been declared executory in the forms established by the Code of Civil Procedure, saving however the dispositions of international conventions.

4. The modes of executing acts and judgments are governed by the law of the place where their execution is proceeded with.

Italian Code, Preliminary Article 10. The clauses of this article are not numbered in the code.

The first clause expresses a doctrine received in all countries. It is that of the *lex fori*, but is sometimes grouped under the *lex actus*,

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together with the doctrine relating to the forms of other than judicial acts.

The second clause excepts from the *lex fori*, and refers to the *lex loci contractus*, all rules relating to the mode of proof, such as are contained in the English statute of frauds. It has been, and in other countries than Italy still is, a much controverted point, under which law such rules should fall.

The third clause gives the force of *res judicata* to foreign judgments *in personam*, by admitting them to be executed in Italy without any reexamination of the merits of the cause. The Code Napoleon contains nothing express on this point, and for a considerable time after its enactment the prevailing opinion was that the matter was still governed by Art. 121 of the ordinance of 1629 (see above, p. 26), and that consequently a Frenchman could require the merits of a foreign judgment to be reexamined, while against a foreigner the judgment of a foreign, but competent, court could be put in force in France without opening the door to a renewed contest on the merits. Now however the opinion prevails that a reexamination on the merits can be claimed in France even by foreigners.

The fourth clause, like the first, is of universal reception. In fact both these clauses deal with the action of constituted authorities, judicial in the case of the first, judicial or other in that of the fourth, and it is plain that a constituted authority must follow, as to its mode of action, the law of its constituent authority.

Penal and police laws.

Penal laws, and the laws of police and public security, bind all those who are found within the territory of the kingdom. Italian Code, Preliminary Article 11.

The doctrine of this article also is universally received. The Code Napoleon has:

The laws of police and security bind all those who inhabit the territory. Art. 3.

Reservation in favour of stringent domestic policy.

Notwithstanding the dispositions of the preceding articles, neither the laws acts or judgments of a foreign country, nor private dispositions or contracts, can

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in any case derogate from prohibitive laws of the kingdom concerning persons property or acts, or from laws which in any way whatever regard public order or good morals. Italian Code, Preliminary Article 12.

Correspondingly the Code Napoleon has:

Private contracts cannot derogate from laws which interest public order or good morals. Art. 6.

Some reservation of this kind is in theory inevitable. It merely amounts to saying that, just as there are nations, like the Turks or the Chinese, whose views and ways are so different from ours that we could not establish at all between them and us a system of private international law, by which effect might as a general rule be given in Christian states to their laws and judgments, so, between Christian states, differences of views and ways may exist which may necessitate exceptions to the general rule of giving effect to their laws and judgments. Thus, even while slavery existed in certain Christian countries, the rights arising out of it were very rarely recognized in those Christian countries where it did not exist. Now however the most important practical effect of the reservation is the non-recognition of foreign divorces in countries where a religious objection to divorce is entertained.

Rights of Foreigners.

Foreigners are admitted to the enjoyment of the same civil rights as citizens. Italian Code, Art. 3.

The rights which an alien enjoys in any country more properly belong to the law of that country, as such, than to the system which it follows with regard to private international law, considered as the choice of a law to judge by. Thus the incapacity of aliens to hold English land in fee, now abolished, was a part of English law, and might have been so all the same, even though the English courts had held that the effect of marriage on English land, so far as any one could acquire rights in it, was governed by the law of the matrimonial domicile instead of by the *lex situs*. But the matter deserves mention in a treatise on private international law, because any incapacity of aliens existing by the *lex fori* must be

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enforced by a court of justice, with the effect in many cases of preventing a resort to the maxims of that subject in order to choose a law to judge by, similar to the effect of the general reservation in favour of stringent domestic policy which was considered in the last section. Indeed, if the Italian code had contained a law placing aliens under any incapacity, such would have been a prohibitive law of the kingdom, within the meaning of the Preliminary Article 12. And in France the incapacity under which aliens formerly lay by the *droit d'aubaine*, either to succeed or to transmit by will, did very seriously contract the application in that country of the law of the domicile in cases of succession. But more equitable principles of jurisprudence have so generally assimilated the rights of foreigners to those of subjects or citizens that this branch of our subject need not occupy us long. The Code Napoleon, besides admitting to all civil rights the foreigner who has established his domicile in France with the sanction of the government (Art. 13, quoted above, on p. 28), lays down the rule:

> A foreigner shall enjoy in France the same civil rights which are or shall be granted to Frenchmen by the treaties of the nation to which he belongs. Art. 11.

This theoretical exaction of a reciprocity guaranteed by treaty, which after all is practically disregarded by the French courts, may be looked on as a kind of homage which the country of the *droit d'aubaine* still thought fit to pay to the principles which guided it in the past. By the law of 14 July 1819, the right of succession to property was conceded to foreigners without any condition of reciprocity, but with the following clog:

> In distributing a succession between French and foreign coheirs, the former shall take preferentially out of the property situate in France a portion equal in value to that of the property situate abroad from which they may be excluded, on whatever ground, by virtue of local laws or customs.

On the questions arising out of this clause the reader may consult an article by M. Renault, in the *Journal du Droit International Privé*, t. 8, p. 15.

In the Prussian and Austrian codes the demand of reciprocity

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appears in far milder forms than in the French. The articles of the Prussian code are these.

Introduction, § 40. The laws extend their protection to every one whom they bind.

§ 41. Thus foreign subjects will enjoy all the rights of inhabitants, in the conduct of permitted transactions in this country, so long as they do not render themselves unworthy of the protection of the laws.

§ 42. The difference of the laws of foreign states causes no exception to this rule.

§ 43. But if a foreign state makes grievous ordinances, to the prejudice of foreigners generally or of the subjects of this state in particular, or knowingly permits the subjects of this state to suffer misusage of that kind, the right of retorsion arises.

§ 44. Inferior judges shall never decide against foreigners on principles of retorsion without the sanction of their superiors.

§ 45. On the other hand, foreigners cannot escape from the law of retorsion by making over their rights to subjects either of this country or of other more favoured countries.

The Austrian code has this.

§ 33. Foreigners have in general the same civil rights and obligations as natives, when the character of a citizen is not expressly required for the enjoyment of those rights. But in order to enjoy the same rights as natives, foreigners must prove in doubtful cases that the state to which they belong treats the citizens of this country like its own, with regard to the right in question.

The honour of being the first country to admit foreigners to a full equality of private rights with citizens, without any regard to reciprocity, is due to the Netherlands. Art. 9 of the law of 1888, containing general dispositions on the legislation of that kingdom, is expressed in terms almost identical with those of the article of the Italian code quoted at the head of this section.

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CHAPTER III.

CAPACITY, AND FOREIGN GUARDIANSHIPS AND CURATORSHIPS.

I NOW come to the main object of this work, the rules which are received in England on private international law, and it seems best to follow the Italian code by commencing with the capacity and family relations of persons. Any proposition which can be laid down as supported by the weight of English authority, and any proposition as to which the English authorities are too discrepant for either the affirmative or the negative of it to be so laid down, will be numbered for convenience as a §. Such propositions will differ in their breadth and importance with the measure in which our courts have had occasion to pronounce themselves on the different parts of the subject. They must not therefore be taken as draft articles of a codifying act of parliament, but simply as a mode of presenting the actual state of English jurisprudence. Irish authorities will occasionally be quoted, since the laws of England and Ireland are the same on the matters in question. And the decisions of the house of lords on Scotch appeals, and those of the privy council on colonial appeals, will be quoted without special remark, whenever it is evident that nothing was meant to turn on the reception of any particular rule of private international law, as a part of the national law of the country appealed from.

§ 1. Whenever the operation of a personal law is admitted in England, the domicile of the person in question, and not his political nationality, is considered to determine such personal law.

§ 2. When the capacity of a person to act in any given way is questioned on the ground of his age, it is perhaps still uncertain whether the solution of the question will be referred in England to a personal law.

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The following authorities are opposed to the admission of a personal law in such case.

A person is of less than full age by every law to which reference could be made. His capacity to bind himself by a contract for the purpose of articles of a given description, necessaries or other, is to be decided by "the law of the country where the contract arose." *Male* v. *Roberts*, 1800, 3 Esp. 163, Eldon. A person who is a minor by the law of his domicile resides and trades in another country, where he is adjudged insolvent. His personal property situate in the country of his domicile passes to the assignee in such insolvency. *Stephens* v. *McFarland*, 1845, 8 Ir. Eq. 444, Blackburne. The Comte de Paris was held to be domiciled in France, and was under 21, but had been emancipated in accordance with French law, so far only however as still to require the assistance of a curator, who had been duly appointed in accordance with the same law. Sir C. Cresswell refused to make a grant of administration to him assisted by his curator, and required him, according to the English practice, to elect his next of kin as his guardian for the purpose of administration on his behalf. *Re d'Orléans*, 1859, 1 S. & T. 253; 28 L. J., N. S., P. & M. 129. "In general, the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made:" Cresswell, in *Simonin* v. *Mallac*, 1860, 2 S. & T. 77; though his opinion in *Mette* v. *Mette*, quoted below under § 21, prevents this learned judge being counted as a positive authority in favour of the *lex loci contractus*. In *Sottomayor* v. *De Barros*, 1879, 5 P. D. 94, Hannen, at p. 100, expressed himself in favour of the *lex loci contractus* as governing personal competency, after citing the pronouncement of lord justice Cotton in the same case in 1877, quoted below. In *Huet* v. *Le Mesurier*, 1786, 1 Cox 275, Kenyon required proof that a person who was baptized in Guernsey, and petitioned for the payment of money out of court, had attained 21; but it does not appear that the petitioner was domiciled in Guernsey, nor was the fact that majority there is at 20 referred to. The remarks in the introduction, pp. 6, 10, on the old English base of jurisdiction, and their effect in hindering the reception of the notion of a personal law, may also be referred to.

The following authorities are in favour of the personal law.

Sir J. Nicholl granted administration, limited to the receipt of the dividends on a sum of stock, to a Portuguese lady who would have been a minor by English law, but was emancipated by the law of her domicile, and who was entitled during her life to the dividends in question. Dr. Lushington, who moved for the grant, put it on the ground that by the law of her domicile the lady could not appoint a guardian; an argument which strengthens the assertion of the personal law as governing capacity. *Re da Cunha*, 1828, 1 Hag. Ecc. 237. "The civil status is governed universally by one single principle, namely that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend." Westbury, in *Udny* v. *Udny*, 1869, L. R., 1 Sc. Ap. 457. "As in other contracts, so

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in that of marriage, personal capacity must depend on the law of domicile." Cotton, in *Sottomayor* v. *De Barros*, 1877, L. R., 3 P. D. 5. "The capacity to contract is regulated by the law of domicile." Halsbury, in *Cooper* v. *Cooper*, 1888, 13 Ap. Ca. 99. In this case lords Watson and Macnaghten declared against the *lex loci solutionis* as regulating the capacity to contract, but expressed no clear opinion between the domicile and the *locus contractus celebrati*, which happened to be the same. See also the next §.

The following authority admits the personal law, but not as exclusive.

A person domiciled abroad can give an effectual receipt for a legacy bequeathed to him by a testator domiciled in England, on attaining his majority by English law or by the law of his domicile, whichever first happens. *Re Hellmann*, 1866, L. R., 2 Eq. 363, Romilly.

It will be observed in the above that lord Westbury puts majority or minority on the same footing with marriage, and that lord justice Cotton puts marriage on the same footing with other contracts. Indeed, in the case of marriage, there is an incapacity on the ground of age which cannot be distinguished in principle from incapacity on the ground of age to buy an estate, although the age for capacity with regard to those two subjects of contract may be different. There is also, in the case of marriage, a relative incapacity on the ground of consanguinity or affinity with the other party, which on the continent is treated as being as much a matter for the personal law as absolute incapacity on the ground of age. At least, as to both these points, the marriage cannot be valid if the personal law pronounce a party to it incapable, whether for age or for consanguinity, but a similar objection existing by the law of the place of celebration would equally be fatal to it, because without a lawful celebration the tie cannot arise. Now it will be seen hereafter that the same view of the influence of the personal law on marriage has been adopted in England, by a decision later than all the authorities above cited against the admission of the personal law on minority generally. I refer advisedly to the decision of the house of lords in *Brook* v. *Brook*, because in the determination of that case by the court of first instance, in which Sir C. Cresswell himself took part, the point of domicile was not clearly referred to as decisive. But the dicta of lord Westbury and lord justice Cotton were subsequent to the full

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and final consideration of *Brook* v. *Brook*, and the express reference which, as already observed, is made to them in marriage, would seem to have been intended to mark the sense of those learned judges that the determination with regard to marriage has fixed the rule for capacity in other cases as well. And the adhesion of lord Halsbury to the same side may be expected to give it a decisive preponderance.

Supposing this to be so, it would not follow that the general rule with regard to age requires that the capacity to act should be affirmed both by the personal law and by that of the special transaction. The case of marriage is peculiar, in that in almost all countries that particular tie is not created without the intervention of public authority, applied by means of some ceremonial, civil or religious. It may therefore well be that such a ceremonial is void unless the conditions are present which the law of the place of celebration requires to be fulfilled in the contracting parties, no less than those which their personal laws require, and yet that, if the latter conditions are present, the former may not be necessary to the legal effect of a contract which no public minister is called on to authenticate. If therefore the English courts should in future hold that the general rule to govern capacity as affected by age must be drawn simply from the personal law, they will put themselves far more nearly in accordance with the continental rules than they would do if they drew their general rule from the *lex loci contractus*. No doubt, in pp. 28—30, we have seen the exceptions to the principle of the personal law which are allowed, in France, Prussia and Austria, to operate in favour of the validity of transactions. And notwithstanding lord Romilly's opinion in *re Hellmann*, the limits which an all but invariable understanding sets in England to the authority of judges would certainly prevent them from establishing, without the aid of parliament, any similar exceptions to whichever rule, that of the personal law or that of the *lex loci contractus*, they may adopt as the general one for capacity. But if the former be adopted, it will only remain for parliament, in pursuance of conventions to be concluded with foreign countries, to select between domicile and political nationality as the criterion of personal law, and to establish such

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exceptions to the application of the personal law as convenience may seem to require. And it may be confidently hoped that the time is approaching when uniformity in private international jurisprudence will be attainable by means of conventions, carried out by legislation wherever necessary, and that neither the parliament nor the government of this country will hesitate to cooperate towards so desirable an end.

§ 8. When the capacity of a married woman to act in any given way is questioned on the ground of her coverture, it would seem that the choice between the *lex loci contractus* and her personal law, as deciding the question, should follow whatever may be laid down as to the similar choice when capacity is questioned on the ground of age. Nor does any distinction between these cases appear to have been contemplated in the sweeping dicta with regard to the rule for personal capacity which have been quoted under the preceding §. Consequently, to the authorities in favour of the personal law there cited, may be added that of *Guépratte* v. *Young*, 1851, 4 De G. & S. 217, Knight-Bruce. There the capacity of a married woman to contract in England with the concurrence of her husband, on the subject of an expectation under an English settlement, their domicile being French, and the particular expectation having been comprised in her *dot* by a French contract made on their marriage, was referred by the vicechancellor to the law of France. It is true that it was much discussed whether the law of France, as that of the marriage contract, permitted the contract before the court to be made, independently of any question about capacity properly so called; but the latter question was not, and could not have been, absent from the mind of the judge.

The question whether a foreign wife, having capacity by the law of her domicile to trade in partnership with her husband, can sue in England, jointly with him, on contracts made in such trade, was noticed in *Cosio* v. *De Bernales*, 1824, 1 C. & P. 266, Ry. & Mo. 102, Abbott, but not decided, because the foreign law was not proved. In *Peillon* v. *Brooking*, 1858, 25 Beav. 218, Romilly, it was held that a married woman was not freed from a restraint on anticipation, annexed to the bequest of income to her by an English will, by the circumstance that the law of her domicile did not allow of such a restraint on her capacity. In *Lee* v. *Abdy*, 1886, 17 Q. B. D. 309, Day and Wills, the assignment of a policy of insurance to the wife of the assignor was held void,

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but the assignment had been made in the domicile, and it was not made clear on which ground the law of that country was regarded as governing the wife's capacity to take the assignment. See *Duncan* v. *Cannan*, quoted below, under § 39.

§ 4. The authority of a foreign parent over his child is recognized in England, to the extent to which an English parent would have similar authority.

Cottenham, in *Johnstone* v. *Beattie*, 1843, 10 Cl. & F. 113, 114.

§ 5. When a foreign minor or lunatic is in England, the English court is undoubtedly competent to appoint a guardian of his person and estate in the case of a minor, or to issue a commission of lunacy in the case of a lunatic, notwithstanding that he has a foreign guardian, curator, or committee of his person or estate. But opinions have differed as to the cases in which this power ought to be exercized.

§ 6. With regard to the person, one view is that a guardian or committee of the person, either appointed by foreign jurisdiction or holding the office by force of foreign law without judicial appointment, has no authority over his minor or lunatic in England; and that therefore, when the latter is in England, the English court ought, on application, to exercise the power mentioned in § 5.

Lunatics: *re Houstoun*, 1826, 1 Russ. 312, Eldon. Minors: *Beattie* v. *Johnstone*, 1841, 1 Ph. 17, Cottenham; *Johnstone* v. *Beattie*, 1843, 10 Cl. & F. 42, Lyndhurst, Cottenham, Langdale.

The other view is that guardians and committees, deriving their office from the proper personal law or jurisdiction of the minors or lunatics, have authority over such minors or lunatics in England, and that therefore the English court ought not in such cases to appoint guardians or committees of the person without special cause.

Brougham and Campbell, in *Johnstone* v. *Beattie*, u. s.; both expressing themselves with regard to minors, but Brougham also mentioning the case of lunatics, 10 Cl. & F. 97. And see the next §, especially the minutes in *Nugent* v. *Vetzera*, declaring that "Vetzera, as such [foreign] guardian, shall have the exclusive right to the custody and control of the infants."

§ 7. But, now at least, the English court, in appointing a guardian

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or committee of the person, will support the authority of the guardian or committee existing under the personal law or jurisdiction, and not defeat it unless it should be abused.

Minors: *Nugent* v. *Vetzera*, 1866, L. R., 2 Eq. 704, Wood, where the minutes were as follows. "Declare that the order appointing guardians in this country shall be without prejudice to the order of the [Austrian] consular court appointing Signor Vetzera guardian, and that Vetzera, as such guardian, shall have the exclusive right to the custody and control of the infants. Liberty to the defendant to apply as to the removal of the children from this country or otherwise. Motion to discharge the service abroad refused. On the motion o appoint a guardian *ad litem*, the defendant Vetzera appointed guardian *ad litem*." *Di Savini* v. *Lousada*, 1870, 18 W. R. 425, James. See *Stuart* v. *Bute*, 1861, 3 H. L. 440; Campbell, Cranworth, Wensleydale, Chelmsford, Kingsdown. See also *Dawson* v. *Jay*, 1854, 3 D. M. G. 764, Cranworth; and lord Campbell's comment on that case, in *Stuart* v. *Bute*, 3 H. L. 467.

Lunatics: *re Sottomaior*, 1874, 9 Ch. Ap. 677; Mellish, James.

§ 8. Where a minor is a British subject, though only by statute, the English court is competent to appoint him a guardian even though he is domiciled in a country politically foreign, and will do so in a proper case, notwithstanding that he is neither present within the jurisdiction nor has any property within it.

Re Willoughby, 1885, 30 Ch. D. 324; Kay, affirmed by Cotton and Lindley. In *re Bourgoise*, 1889, 41 Ch. D. 310, Cotton, Lindley and Bowen, the appointment was refused because the case was not a proper one.

§ 9. With regard to the estate——the guardian, curator, or committee of the estate, either appointed by the personal jurisdiction or holding the office by force of the personal law without judicial appointment, can sue and give receipts in England for the personal property of his minor or lunatic. Both as to this § and as to § 6, it will be observed that the office being held by law without judicial appointment often happens in the case of minors, though it can scarcely do so in that of lunatics. The doctrine of this § very much restricts the occasions for the exercise of the power mentioned in § 5.

Lunatics: *Newton* v. *Manning*, 1849, 1 M. & G. 362, Cottenham; *re Elias*, 1851, 3 M. & G. 234, Truro; *Scott* v. *Bentley*, 1855, 1 K. & J. 281, Wood; *Hessing* v. *Sutherland*, 1856, 25 L. J. (N. S.) Ch. 687, Knight-Bruce and Turner; *re Baker*, 1871, L. R., 13 Eq. 168, Wickens. In the last case the lunatic had been judicially found such in the colony of Victoria, and the

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colonial master in lunacy appeared by the colonial statute to be in the position of a committee.

Where a woman was under restraint in New South Wales, but had not been found lunatic there nor was her estate vested in the master in lunacy there, although he had power to sue, it was held that he could not sue or give receipts for her estate in England, although a trustee would be justified in paying to him whatever he or any other proper authority in New South Wales decided that it was for her benefit to expend for her: *re Barlow's will*, 1887, 36 Ch. D. 287; Cotton, Bowen and Fry, affirming Kay. Apparently the New South Wales master in lunacy could have sued and given receipts in England, (1) f the estate had been vested in him (Cotton), or (2) if there had been a declaration in New South Wales affecting the woman's status (Bowen and Fry).

Lord Eldon seems to have questioned the power attributed in this § to a foreign committee of the estate of a lunatic: *re Houstoun*, 1826, 1 Russ. 312. But both as to this point and as to the authority over the person, with reference to which the case is quoted above, § 6, the report is so worded as to leave it possible that Lord Eldon only issued the commission because, the lunatic being in England, he thought it necessary for his protection that not merely a committee, but an English court, should have authority over him and his property. Again, it is not quite clear that the lunatic was not domiciled in this country at the time of the application. If the chancellor really meant to deny the power of the committee in the domicile to sue and give receipts in England, his opinion must be considered to have been overruled by the later authorities here quoted.

Minors. A father claimed the enjoyment of his children's property up to the age of 18, under Art. 384 of the Code Napoleon, and Sir L. Shadwell appears to have rejected the claim only on the ground that the children were domiciled in this country, and not in that in which the Code Napoleon was in force: *Gambier* v. *Gambier*, 1835, 7 Sim. 263. In *re Hellmann*, however—1866, L. R., 2 Eq. 363—where a legacy was bequeathed to an infant, lord Romilly refused to direct the executors to pay it to the father, entitled by the law of the domicile to receive it as guardian. The latter case may perhaps be put on the ground of judicial discretion, as in § 10: otherwise it would not seem to be maintainable, for a distinction could hardly be drawn between recognizing the guardian of an orphan and recognizing the father as guardian during his child's life, or between recognizing a guardian by law and one judicially appointed, and the general doctrine seems to be sufficiently established as well by the cases with regard to lunatics as by that next cited. A Scotch *curator bonis* and *factor loco tutoris* is the proper person to retain the English assets of his Scotch minors: *Mackie* v. *Darling*, 1871, L. R., 12 Eq. 319, Wickens. In *exp. Watkins*, 1752, 2 Ves. Sen. 470, it is said, but the saying appears to be only that of counsel, that the appointment in a colony of a guardian of personal estate failed as soon as the infant came to England. Lord Hardwicke appointed a guardian of the personal estate, for which there may have been some special necessity.

§ 10. But where the property is in the custody of the court, or can only be reached by an order to be made by the court under its jurisdiction as to trust property, or under the statutory jurisdiction

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as to property vested in lunatics, it is in the discretion of the court whether and to what extent it will hand over the property, or the income of it, to the foreign guardian, curator or committee.

Re Morgan, 1849, 1 H. & T. 212, Cottenham; *re Stark*, 1850, 2 M. & G. 174, Langdale and Rolfe; *re Sargazurieta*, 1853, 20 L. T. 299, Cranworth; *re Garnier*, 1872, L. R., 13 Eq. 532, Malins. All these are cases with regard to lunatics.

§ 11. It is in the discretion of the court whether to treat a foreign minor as a ward of court, in a case where an English infant would be such a ward.

Brown v. *Collins*, 1883, 25 Ch. D. 56, Kay.

§ 12. "Where any stock, or any portion of the capital stock or any share of any company or society, whether transferable in books or otherwise, is standing in the name of or vested in a person residing out of England and Wales, the lord chancellor intrusted as aforesaid" [that is, by the interpretation clause, the judges exercising the jurisdiction in lunacy], "upon proof to his satisfaction that the person has been declared idiot lunatic or of unsound mind, and that his personal estate has been vested in a curator or other person appointed for the management thereof, according to the laws of the place where he is residing, may order some fit person to make such transfer of the stock, or such portion of the capital stock or share as aforesaid, or any part or parts thereof respectively, to or into the name of the curator or other person appointed as aforesaid, or otherwise, and also to receive and pay over the dividends thereof, as the lord chancellor intrusted as aforesaid may think fit." Lunacy Regulation Act 1853, st. 16 & 17 Vict. c. 70, s. 141. The court has a discretion in acting under this provision: see the last §.

The meaning of "stock" is enlarged by the interpretation clause, and security will not be required from the foreign curator if it would not be required from him in the country of his appointment. *Re Mitchell*, 1881, 17 Ch. D. 515; James, Baggallay, Lush.

"The masters shall be at liberty, without order of reference, to inquire and report whether or not any person residing out of England

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and Wales, and where, has been declared idiot lunatic or of unsound mind; and whether or not his personal estate, or some and what part thereof, has been vested in a curator or other and what person appointed for the management thereof, according to the laws of the place where the person is residing; and whether or not any and what stock, portion of the capital stock, or share of any and what company or society, is standing in the name of or is vested in that person, and what is his interest therein." Lunacy Regulation Act 1853, s. 85.

§ 13. But no English legislation about lunatics or their committees can be applied to persons who have only been found lunatic in foreign proceedings, or to committees or curators appointed in foreign proceedings, without express words to that effect.

Sylva v. *Da Costa*, 1803, 8 Ves. 316, Eldon; overruling, *exp. Otto Lewis*, 1749, 1 Ves. Sen. 298, Hardwicke.

§ 14. Nor can the English jurisdiction in lunacy be applied to any one unless an enquiry into the state of his mind is first made under an English commission.

Re Houstoun, 1826, 1 Russ. 312, Eldon.

§ 15. The measures which in different legislations are taken to supply the defect of capacity are not confined to the case where that defect is total, but often extend to supplementing a capacity which is deemed to be only incomplete. Thus a wife may be capable of acting with her husband's concurrence, but not otherwise; a minor who has passed out of guardianship may still be capable of acting with the concurrence of a curator, but not otherwise. In such and the like instances it would seem on principle that the modified capacity is one entire institution, and cannot be divided into an abstract capacity to be determined by the personal law, and the practical limits set to that capacity by the personal law, which are to be ignored. But a different view was taken in *Worms* v. *De Valdor*, 1880, 49 L. J. Ch. 261, 41 L. T. 791, 28 W. R. 346, Fry. There a French plaintiff, who in France was incapable of suing without the concurrence of a *conseil judiciaire*, on the ground of his having been adjudicated a prodigal, was allowed to sue without the con-

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currence of his *conseil judiciaire*. It was shown that the plaintiff's condition in France was not that of total interdiction, and the learned judge said: "There being therefore no change of status, but merely a requirement of French law in particular cases, it appears to me that that does not prevent the plaintiff in this case from suing in this action." But what is status except the sum of the particulars in which a person's condition differs from that of the normal person? If there had been no change of condition the question would not have arisen, and how can a change of condition which is not one of status be distinguished from one that is such? The learned judge quoted with approval this passage from Story's *Conflict of Laws*, s. 104: "personal disqualifications not arising from the law of nature, but from the principles of the customary or positive law of a foreign country, and especially such as are of a penal nature, are not generally regarded in other countries where the like disqualifications do not exist." Probably no English judge would now found any proposition on the law of nature, not in the sense of just and reasonable principles, but in that of an ascertainable code of rules. So the real ground of the decision may be taken to have been that prodigality and a *conseil judiciaire* are institutions foreign to English law. But so is the *curator bonis* of a person above the age of pupillarity, and yet the title of a Scotch *curator bonis* is recognised: *Mackie* v. *Darling*, quoted above, p. 50. If the personal law is admitted when it declares the complete incapacity of a person under a certain age, the capacity of one above that age can scarcely, with consistency, be accepted to any greater extent than that in which the personal law confers it, unless the limitation under which it lies by that law is penal, or otherwise falls under the next following §.

§ 16. An incapacity existing by a foreign law of a penal or religious nature, or so opposed to British principles as for example is slavery, will be disregarded in England. This is a more extensive doctrine than would result from the reservation in favour of any stringent domestic policy with which all rules for giving effect to foreign laws must be understood (see above, p. 39), for foreign penal laws may be thoroughly in accordance with English policy,

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but the doctrine seems nevertheless to have always been received in England in the whole extent here stated.

Lord Justice (then justice) Fry's quotation with approval from Story in *Worms* v. *De Valdor:* see last §. The doctrine was held in England as to the incapacity resulting from religious profession abroad, even while that incapacity was known to English law. "If a man or woman be professed in religion in Normandy, or in any other foreign part, such a profession shall not disable them to bring any action in England, because it wanteth trial; but they must be professed in some house of religion within this realm, for that may be tried by the certificate of the ordinary, so as of foreign possessions the common law taketh no knowledge:" Co. Litt. 132 b. "Has it not always been held that profession in a foreign country did not cause civil death?" Knight-Bruce, in *re Metcalfe*, 1864, 2 D. J. S. 124.

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CHAPTER IV.

MARRIAGE, DIVORCE, LEGITIMACY.

Marriage.

PROCEEDING, as does the Italian code, from capacity to family relations, the remark has first to be repeated that marriage is peculiar among contracts, in that in almost all countries that particular tie is not created without the intervention of public authority, applied by means of some ceremonial, civil or religious. It may therefore well be that such a ceremonial is void unless the conditions are present which the law of the place of celebration requires to be fulfilled in the contracting parties, no less than those which their personal laws require, although, if the latter conditions are present, the former may not be necessary to the legal effect of a contract which no public minister is called on to authenticate. See above, p. 46. Indeed marriage interests both the country in which its tie begins to exist, and that in which the permanent relations of the parties destine it to continue. On this account, and also in order to facilitate a more thorough examination of the authorities, the English doctrines on the validity of marriages will here be split up into a greater number of propositions than would result from simply enquiring by what law each element in that validity is to be determined.

§ 17. It is indispensable to the validity of a marriage that the *lex loci actus* be satisfied so far as regards the forms or ceremonies.

Bulter v. *Freeman*, 1756, Ambl. 303, Hardwicke; *Lacon* v. *Higgins*, 1822, 3 Star. 178, Dow. & Ry. N. P. 38, Abbott; *Kent* v. *Burgess*, 1840, 11 Sim. 361, Shadwell. See also *Swift* v. *Kelly*, 1835, 3 Knapp 257, Brougham; where the validity of a marriage contracted at Rome depended on the sufficiency of the abjuration of protestantism by the parties, and the question whether their abjuration was sufficient was decided according to the law of the Roman church.

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§ 18. It is also indispensable to the validity of a marriage that the *lex loci actus* be satisfied so far as regards the consent of parents or guardians.

Scrimshire v. *Scrimshire*, 1752, 2 Hagg. Cons. 395, Simpson; *Middleton* v. *Janverin*, 1802, 2 Hagg. Cons. 437, Wynne. In both these cases there was also a defect of form according to the *lex loci actus*, and in the second, where the marriage was solemnized by the chaplain of the Dutch garrison at Furnes in Austrian Flanders, it does not appear that by the law of Austrian Flanders the want of consent would have been fatal to the marriage, although by Dutch law it was so. But in each case the court went on the broad ground that a marriage void for any reason by the *lex loci actus* cannot be set up by the *lex domicilii*.

In *Harford* v. *Morris*—1776, 2 Hagg. Cons. 423, Hay, and 1781 and 1784, 2 Hagg. Cons. 436, Court of Delegates—the marriage, which was solemnized abroad, was invalid according to the *lex loci actus* for want both of form and of the necessary consent, and it was further alleged that it had been procured by force. Also, since Lord Hardwicke's marriage act had been passed in the interval between the marriages in *Scrimshire* v. *Scrimshire* on the one hand and those in *Harford* v. *Morris* and *Middleton* v. *Janverin* on the other, the want of consent, which at the earlier date would have rendered the marriage only irregular if celebrated in England without banns, would have been fatal to it at either of the two later dates. Hence the validity of the marriage in the two later cases could only be maintained on the ground that there existed a *jus gentium* on the subject of marriage, adopted by the old law of England, and which therefore, through the saving in Lord Hardwicke's act of Scotland and of marriages solemnized beyond sea, continued in force as an English law of marriage for English persons married abroad, notwithstanding that the *lex loci actus* might be quite different. This doctrine must not be confounded with that in *Lautour* v. *Teesdale;* see below, §§ 26, 28. To the latter no objection can be made, because the maxims of private international law do not apply with reference to the native laws in India, between which and Christian legal systems there is no jural intercommunion. Stated as in *Harford* v. *Morris*, with reference to a marriage in Christian Europe, the doctrine went far towards the denial of all private international law. Yet Sir George Hay rejected the allegation of force, and sustained the marriage on this ground; but the Delegates declared the marriage invalid on the ground of force, leaving the question of law undetermined. The latter question was again raised, and set at rest, in *Middleton* v. *Janverin*, so that *Harford* v. *Morris* seems no longer to need citation.

§ 19. It is equally indispensable to the validity of a marriage that the *lex loci actus* be satisfied so far as regards the capacity of the parties to contract it, whether in respect of the prohibited degrees of affinity, or in respect of any other cause of incapacity, absolute or relative.

This proposition does not appear to have been questioned in any English case, and it is covered by the broad view above referred to as having been taken

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in *Scrimshire* v. *Scrimshire* and *Middleton* v. *Janverin*, that a marriage void for any reason by the *lex loci actus* cannot be set up by the *lex domicilii*. A still broader doctrine would seem to have been propounded in *Dalrymple* v. *Dalrymple*, 1811, 2 Hagg. Cons. 54, Scott, which was the case of a marriage in Scotland between a Scotch lady and a gentleman who is treated in the judgment as domiciled in England (see pp. 54, 60, 61). The discussion in the judgment turns entirely on the sufficiency of the compliance with the forms necessary in Scotland, and the want of the consent of Mr. Dalrymple's father, which English law would have required, is not alluded to. On the contrary, Sir William Scott says: "The only principle applicable to such a case by the law of England is that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin" (p. 59). The propositions contained in this and the two preceding §§ amount to the statement that no marriage rights can be valid unless they are valid by the law of the country where, if they exist at all, they had their origin; but § 21 will show that marriage rights which are countenanced by the law of the country where, if they exist at all, they had their origin, are not always deemed valid in England.

§ 20. A marriage in which the forms required by the *lex loci actus* have been satisfied is valid in England, in point of form.

Herbert v. *Herbert*, 1819, 3 Phil. Eccl. 58, 2 Hagg. Cons. 263, Scott; *Smith* v. *Maxwell*, 1824, Ry. & Mo. 80, Best.

§ 21. It is indispensable to the validity of a marriage that the personal law of each party be satisfied so far as regards his capacity to contract it, whether absolute, in respect of age, or relative, in respect of the prohibited degrees of consanguinity or affinity.

Brook v. *Brook*, 1857 & 1858, 3 Sm. & G. 481, Cresswell & Stuart; 1861, 9 H. L. 193, Campbell, Cranworth, St. Leonards, Wensleydale. In *Mette* v. *Mette*, 1859, 1 S. & T. 416, Cresswell, the incapacity existed by the law of the man's domicile, but not by that of the woman's; and the marriage was held invalid expressly on the ground that the capacity of each party by his own law was necessary, and without reference to any superior claims of the law of the husband's domicile, as being that of the matrimonial domicile if the marriage be supposed to be valid. In *Sottomayor* v. *De Barros*, 1877, 3 P. D. 1, Cotton, James, Baggallay; reversing S.C., 1877, 2 P. D. 81, Phillimore; the case of a marriage solemnized in England between parties domiciled one in England and the other in Portugal, and related to each other within degrees prohibited in Portugal but not in England; the circumstance that a marriage within the degrees in question would have been valid according to the *lex domicilii*, if a papal dispensation had been obtained, was adverted to but disregarded. In the same case, 1879, 5 P. D. 94, Hannen held the marriage good; but this authority is weakened, (1) by the learned judge's pronouncement in favour of the *lex loci contractus* as governing competency, cited above, p. 44; (2) by his taking Cresswell's opinion

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in favour of the *lex loci contractus* from *Simonin* v. *Mallac*, without reference to that learned judge's saying in *Mette* v. *Mette* "there could be no valid contract unless each was competent to contract with the other," 1 S. & T. 423; (3) by his reference to the statutes on the marriage of first cousins, which seems to imply that the rules of private international law are less applicable where the English law is contained in statutes than where it is the common law.

§ 22. That an incapacity to marry of a penal nature, or resulting from religious vows or orders, will not be admitted in England on the ground of the personal law, is a consequence of the doctrine stated in § 16. With regard indeed to religious vows or orders, no principle of British policy can be deemed to be more stringent than that which would refuse to exclude a whole class of the population from the possibility of marriage. But where the penal or religious incapacity for marriage exists by the *lex loci actus*, its direct effect is to prevent the marriage from ever having an inception, and its indirect effect must therefore be to prevent the ceremony or the consent from being regarded in England as having constituted a marriage.

It seems that, by the law of England, an attainted person is not incapacitated from contracting marriage; but the incapacity, if any, will not prevent the English court from recognizing a marriage contracted abroad by an Englishman attainted at home, supposing him to be capable—"in the land in which he is living," Erle—by the *lex loci contractus*, Willes. Keating and Montague Smith concurred. *Kynnaird* v. *Leslie*, 1866, L. R., 1 C. P. 389. It may perhaps be said that in this case there was no incapacity by the personal law, because an attainted man would have adopted the country to which he had fled as his domicile; but the decision would no doubt have been the same, if the judges had adopted political nationality as the criterion of personal law.

§ 23. When by his personal law a party may in some form or other marry without the consent of parents or guardians, the want of such consent will not invalidate a marriage by him which satisfies the *lex loci actus*, although the form observed was not that which by his personal law would have rendered the consent unnecessary. In other words, a consent which it is possible to do without in the domicile ranks, for the purposes of private international law, among the forms of marriage, and not among the conditions of capacity.

This is the case of what were called Gretna Green marriages, the validity of which appears to have first come up for formal decision in *Compton* v. *Bearcroft*,

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1767, Hay, and 1769, Court of Delegates, 2 Hagg. Cons. 430, 443, 444. The marriage in this case, in which Dumfries took the place of Gretna Green, was upheld by Sir George Hay on the same ground which it has been mentioned under § 18 that he took in *Harford* v. *Morris*; but his sentence was affirmed by the Delegates on the ground of the *lex loci*. The same class of marriages was again upheld, and on the ground of the *lex loci*, in *Grierson* v. *Grierson*, 1781, 2 Hagg. Cons. 86, 98, 99; and a similar decision was given as to the marriage of French persons in England, in *Simonin* v. *Mallac*, 1860, 2 S. & T. 67, Cresswell.

§ 24. And a marriage celebrated in England is held valid under the doctrine of § 23, notwithstanding that it has been declared invalid in the country of the domicile on the ground of the purpose of the parties to evade the law of that country.

Simonin v. *Mallac*, 1860, 2 S. & T. 67, Cresswell.

§ 25. When by his personal law a party cannot marry in any form without a certain consent, the want of such consent will invalidate a marriage by him notwithstanding that it satisfies the *lex loci actus*. In other words, a consent which it is impossible to do without in the domicile ranks, for the purposes of private international law, among the conditions of capacity, and not among the forms of marriage.

Sussex Peerage case, 1844, 11 Cl. & F. 85; Tindal, delivering the opinion of the judges; Lyndhurst, Brougham, Cottenham, Denman, Campbell. In this case the marriage required either the express consent of the king in council, under the first section of the Royal Marriage Act, or the tacit consent of parliament under the second section. See also *Sottomayor* v. *De Barros*, above, § 21.

There is an Irish decision contrary to the doctrine asserted in this §, *Steele* v. *Braddell*, 1838, Milw. 1, Radcliff; and it seems to be approved by lord Campbell, in *Brook* v. *Brook*, 1861, 9 H. L. 216. If this be followed, the necessary consents must be placed altogether among the forms of marriage, and not among the conditions of capacity; and then the *Sussex Peerage Case* must be justified by ascribing to the Royal Marriage Act an intention to create a peculiarly stringent incapacity by British law, overriding the usual maxims of private international law. It need not be denied that such an intention would be within the competence of a statute of the domicile, although in *Simonin* v. *Mallac* (see § 24), the court gave no effect to the express claim of the French code to regulate the *état civil* of Frenchmen abroad, or that such an intention might very reasonably be ascribed to the Royal Marriage Act. But since any statute, which enacts that a marriage celebrated in any form without a certain consent shall be null and void, does certainly create an incapacity for marriage without that consent, it appears to me hazardous to draw distinctions on pre-

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sumed intention only, as to the degree of stringency which that incapacity was meant to have; and I prefer to dissent from *Steele* v. *Braddell*, and to justify *Compton* v. *Bearcroft* and *Simonin* v. *Mallac* by the fact that in those cases the marriages were possible in the domicile if the proper forms had been there observed, as I understand lord Campbell himself to do in *Brook* v. *Brook*, 1861, 9 H. L. 215, 218.

§ 26. Where a marriage valid according to the *lex loci actus* is impossible, from the want of any such law applicable to the case, parties may marry with the forms, so far as it is possible to observe them, and with the consents, respectively required by their own law.

Anonymous case in Cruise on Dignities, 276, Eldon; where it was supposed that there was no *lex loci* applicable to the marriage of Protestants at Rome, though it appears from the *Sussex Peerage Case*, 11 Cl. & F. 152, that the marriage in Protestant form might have been sustained as permitted by the *lex loci*. *Lautour* v. *Teesdale*, 1816, 8 Taun. 830, Gibbs; where the impossibility arose from there being no *lex loci* applicable to the marriage of Europeans at Madras, and these, if British subjects, were therefore held entitled to marry there in accordance with English law as it stood before lord Hardwicke's act. *Ruding* v. *Smith*, 1821, 2 Hagg. Cons. 371, Stowell; where the impossibility arose from the Dutch law at the Cape of Good Hope not applying to British persons passing through the place so soon after the conquest that its future legal system was not settled. And see the cases quoted under § 28.

§ 27. "Whereas it is expedient to relieve the minds of all his majesty's subjects from any doubt concerning the validity of marriages solemnized by a minister of the church of England in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory,

As well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad;

Be it &c. enacted &c.

Sect. 1. That all such marriages as aforesaid shall be deemed and held to be as valid in law as if the same had been solemnized within his majesty's dominions with a due observance of all forms required by law.

Sect. 2. Provided &c. that nothing in this act contained shall

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confirm or impair or any wise affect, or be construed to confirm or to impair or any wise to affect, the validity in law of any marriages solemnized beyond the seas, save and except such as have been or shall be solemnized in the places form and manner herein specified and recited." St. 4 Geo. 4, c. 91 (1823).

§ 28. The above enactment appears in some respects to fall short of the true strength of the case, which may be put as follows:

Within the lines of a British army serving abroad, the soldiers and British subjects accompanying the army are not subject to the foreign law, even as a *lex actus*, and therefore may marry with the forms of English law so far as it is possible to observe them.

King v. *Brampton*, 1808, 10 East 282, Ellenborough and Grose. In this case the marriage was not solemnized by any one officiating under the orders of the British commander. The king's troops were said by lord Ellenborough to carry English law with them, for themselves "and other subjects who accompanied them, in the absence of proof that any other law was in force"; and the form of celebration was held to be such as would have been good in England before lord Hardwicke's act, so that it must have been intended to refer to the saving in that act of marriages solemnized beyond sea. This corresponds with the view taken in *Lautour* v. *Teesdale*, as distinct from that of Sir George Hay in *Harford* v. *Morris*, see §§ 18, 26. It is much easier to suppose that parliament intended to reserve an English form of contracting marriages abroad, for English persons not subject to any other *lex actus*, than to suppose that a similar reservation was intended to operate in cases where an applicable *lex actus* exists.

Burn v. *Farrar*, 1819, 2 Hagg. Cons. 369, Scott, was a case precisely within the enactment. The husband was an officer in the British army of occupation in France, and the eminent judge "doubted whether he was at all subject to the French law, as pleaded in the libel." Had the case gone on, the doubt would probably have been confirmed. It will be observed that the same judge decided the case of *Ruding* v. *Smith*, which presents much analogy: see above, § 26.

In cases depending on the enactment, the authority of the commanding officer for the celebration of the marriage is not necessary, it is sufficient that the person officiating should be under his orders: *Waldegrave Peerage*, 1837, 4 C. & F. 649, Cottenham and Brougham.

§ 29. "Whereas &c. and doubts have arisen &c.

Be it &c. enacted &c.

Sect. 1. This act may be cited as the Confirmation of Marriages on Her Majesty's Ships Act, 1879.

Sect. 2. All marriages, both of the parties being British subjects,

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which before the passing of this act have been solemnized on board one of Her Majesty's vessels on a foreign station, in the presence of the officer commanding such vessel, whether solemnized according to any religious rite or ceremony or contracted *per verba de præsenti*, shall be valid in like manner as if the same had been solemnized within Her Majesty's dominions with the due observance of all forms required by law.

Provided that this enactment shall not render valid any marriage which before the passing of this act has been declared invalid by any court of competent jurisdiction in any proceeding touching such marriage, or any right dependent on the validity or invalidity thereof, or render valid any marriage where either of the parties has before the passing of this act and during the life of the other party lawfully intermarried with any person." St. 42 & 43 Vict. c. 29.

The principles on which the authorities quoted under the last § are grounded would lead us to say that this act only declared the law, and that British subjects on board Her Majesty's ships on foreign stations, like those accompanying a British army and within its lines, are not subject to any foreign law, even as a *lex actus*, but may marry in the presence of the commanding officer with the forms of English law so far as it is possible to observe them. And then it would follow that if either of the parties to such a marriage, during the life of the other party and before the passing of the act, intermarried with any other person, such second marriage would not be a lawful one within the proviso.

§ 30. So far as the enactment quoted in § 27 applies to marriages in British embassies, it should be read in connection with the remarks of Sir W. Scott in *Pertreis* v. *Tondear*, 1790, 1 Hagg. Cons. 136, a case on the validity of a marriage celebrated in England in the chapel of the Bavarian ambassador. "It is difficult," he said, "to bring this marriage within the exception"—the exception which was contended for from the forms required by the English law—"as this woman is not described as domiciled in the family of the ambassador. Taking the privilege to exist in ambassador's chapels, which perhaps has not been formally decided, I may still deem it a fit subject of consideration whether such a privilege can protect a

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marriage where neither party, as far as appears at present, is of the country of the ambassador, and where one of them has acquired a matrimonial domicile in this country, and where it is not shewn that she had been living in a house entitled to privilege during her residence in England." By "a matrimonial domicile in this country" was intended the month mentioned in lord Hardwicke's act, as appears from another passage in the judgment. The case was not further pursued. It therefore remains to be determined whether the validity of marriages celebrated in foreign embassies in England is subject to restriction in the view of an English court, with reference to any of the points on which Sir W. Scott doubted; but even if it should be so subject, it has been decided that the enactment quoted in § 27 is not to be interpreted as subject to any similar restriction, and applies where one only of the parties is a British subject.

Lloyd v. *Petitjean*, 1839, 2 Cur. 251, Lushington; marriage in British embassy at Paris between Englishman and Frenchwoman held valid under the statute, though "neither of the parties was a member of the household or in the retinue of the ambassador." In *Este* v. *Smyth*, 1854, 18 Beav. 112, Romilly, a marriage celebrated in the British ambassador's chapel at Paris, between "domiciled English subjects," was held to be valid in England, notwithstanding a difference of opinion between French advocates as to whether it was valid in France. Neither party appears to have been domiciled, as Sir W. Scott expressed it, in the ambassador's family.

§ 31. So far as the enactment quoted in § 27 applies to marriages in British factories, its importance is diminished by the circumstance that such factories are now generally superseded by embassies and consulates. While they existed, they were mostly in eastern countries where the views and ways of the people are so different from ours that the general rules of private international law could not be applied to them, and so the Europeans established there formed separate communities each living by the law of its own European country, as in the dark ages the Romans, Lombards, Franks and others lived in the same country under their respective personal laws. See above, p. 11. The consular jurisdictions which European and American states now exercize in those parts of the world are administered on the same principles, the general rule being that the suit is brought before the defendant's consul and tried by the defendant's law, but marriages in British consulates are regulated by enactments to be

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quoted in the next §. Here however it may be mentioned that, by the st. 4 Geo. 4, c. 67, reciting that the British factory at St. Petersburg was abolished by the emperor of Russia from 20th June 1807, it was enacted "that all marriages (both or one of the parties thereto being subjects or a subject of this realm) that have since the said 20th day of June 1807 been solemnized, or that shall hereafter be solemnized at St. Petersburg by the chaplain to the said Russia company, or by a minister of the church of England officiating instead of such chaplain, in the chapel of the said Russia company or in any other place, before witnesses, shall be as good and valid in law, and so deemed in the United Kingdom of Great Britain and Ireland and in the dominions thereunto belonging, as if the same had been solemnized before the abolition of the said factory."

§ 32. By the st. 12 & 13 Vict., c. 68, after reciting that "it is expedient to afford greater facilities for the marriage of her majesty's subjects resident abroad," it is enacted:

Sect. 1. "That all marriages (both or one of the parties thereto being subjects or a subject of this realm) which from and after the passing of this act shall be solemnized in the manner in this act provided, in any foreign country or place where there shall be a British consul duly authorized to act in such foreign country or place under this act" [by s. 19, an authority from the British government is sufficient], "shall be deemed and held to be as valid in the law as if the same had been solemnized within her majesty's dominions with a due observance of all forms required by law."

Sect. 5. "The like consent shall be required to any marriage by licence under the provisions of this act as is now required by law to marriages solemnized in England by licence; and every person whose consent to a marriage by licence is required by law is hereby authorized to forbid a marriage under the provisions of this act, whether such marriage is intended to be by licence or without licence."

Sect. 21. "Nothing in this act contained shall confirm or impair or in any wise affect, or be construed to confirm or impair or in any wise affect, the validity in law of any marriage solemnized beyond the seas otherwise than as herein provided; and this act shall not extend to the marriage of any of the royal family."

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By st. 31 & 32 Vict., c. 61, after reciting the act last quoted, it is enacted (s. 3) that "every person acting or legally authorized to act in the place of a British consul, such consul being duly authorized to solemnize and register marriages between persons both or one of them being a subject or subjects of this realm, shall be deemed to be a British consul duly authorized for all the purposes of the said recited act."

§ 33. The validity of a marriage being established, the conjugal rights which flow from it must be decided according to the *lex fori*.

Herbert v. *Herbert*, 1819, 3 Phil. Eccl. 58, 2 Hagg. Cons. 263, Scott; in which case it was in vain argued that a sentence for restitution of conjugal rights should only run from the expiration of a term during which, by the *lex loci contractus*, the husband was liable to imprisonment in a fortress, and the wife in a convent, as a punishment for the clandestinity of the marriage.

§ 34. Where the *lex loci contractus* allows polygamy, marriage under it, even in the case of a first wife, is a different thing from monogamous marriage, and will not be regarded in England as a marriage, nor will the matrimonial duties arising under it be enforced, or any divorce or other relief granted for a breach of them.

Hyde v. *Hyde*, 1866, L. R., 1 P. & D. 130, Penzance; following what was intimated by lord Brougham in *Warrender* v. *Warrender*, 1835, 2 Cl. & F. 531, 9 Bl. N. R. 112. *Re Bethell*, 1888, 38 Ch. D. 220, Stirling. But a monogamous marriage contracted with a non-christian under the law of a non-christian but monogamous country by a christian domiciled in this country will be recognized: *Brinkley* v. *Att.-Gen.*, Times of 10 Feb., 1890, Hannen.

Effect of marriage on property.

The reader has been summarily introduced to this subject, on pp. 17, 36—38. Savigny begins by laying it down as the accepted principle, "that the property of the spouses is to be regulated according to the domicile of the husband, not according to the place where the marriage was contracted." He then notices the controversy whether their immovable property falls under the principle or must be regulated by the *lex rei sitæ*, and decides for the former answer, adding: "Since the decision is here the same as above in the case of succession, it might occur to us to seek for a similar foundation by referring it to a universal succession. But such a basis can be admitted for none of the legal institutions with which we are here

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concerned, and in particular not for the *dos*, which comprehends the whole estate of the wife. The true reason is that the choice of the local law must be referred to voluntary submission, while it certainly cannot be assumed with probability that the spouses intended to make the arrangements of their property depend on the accidental circumstance, whether or not a part of the estate consists of immovables situated abroad." * So far as concerns England this conclusion, however sound, for the present gives way to the strict rule :

§ 85. The effect of marriage on English land, in the absence of express contract, is governed by the law of England, without reference either to the domicile of the parties or to the place of celebration of the marriage.

But Savigny's argument is worthy of attention in this country, in which there has been a great tendency to treat the international effect of marriage on property as a case of universal succession or assignment by force of law. A dictum of lord Meadowbank has often been quoted: "the legal assignment of a marriage operates without regard to territory all the world over." † If all countries be considered, and the various kinds of property in each country, it will be found that in the majority of cases marriage does not operate as a legal assignment, even within the territory: and if it did so within the territory, still, as has been observed, the dictum about its operation abroad is just as applicable to the *lex loci celebrationis* as to the *lex domicilii*. It is true that on marriage a mass of movable property, and according to the doctrines received in some countries of immovable property also, is treated internationally as a *universitas juris*, on a common footing based on its special connection with a person; but the ground of such treatment can only be the intention of the person with whom the special connection exists, or his voluntary submission to a certain law.

Savigny proceeds to notice the controversy relating to the case in which the domicile of the husband is changed during the marriage, and enumerates three opinions. First, "that the local law of the

* Syst. d. heut. Röm. rechts, § 379 : Guthrie's translation, p. 242.

† In *Royal Bank of Scotland* v. *Cuthbert*, 1818, 1 Rose 481, 17 F. C. 79, 2 Buchanan 336.

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earliest domicile remains decisive at all periods. . . . . The reason is generally stated to be that in the inception of the marriage there is included a tacit contract, that the conjugal rights of property shall be immutably settled according to the law of the present domicile. This opinion," says he, "I hold to be correct. . . . . A second opinion refuses to assume a tacit contract, and makes the matrimonial rights of property depend solely on the law of the domicile. Hence it is concluded that, in the case where a new domicile is chosen, its law must decide. . . . . A third and intermediate opinion rejects, like the second, the theory of a tacit contract, and likewise allows only the law of the existing domicile to decide, but with the reservation that the estate acquired at the time of the marriage remains unchanged (*jus quæsitum*), and that only future acquisitions shall be governed by the law of the new domicile. Let us examine the arguments for these opinions a little more closely. Our unprejudiced sense of right certainly speaks in favour of the first. When the marriage was about to be contracted, it was entirely in the wife's option either to abstain from it altogether, or to add certain conditions touching patrimonial rights. She has made no such contract, but has accepted the conjugal rights as fixed by the law of the domicile, and naturally has reckoned on its perpetual continuance." Finally, Savigny prefers to call what he conceives to happen a voluntary submission to the law of the domicile, rather than a tacit contract, "which is not conceivable without the distinct consciousness of both parties." *

The Prussian code contains the following provisions, which however, as in the instance cited above on p. 35, are not expressed as rules for applying the laws of independent legislators, but as the will of the Prussian sovereign concerning the respective limits of the laws allowed by him to prevail within his dominions.

Part 2, Title 1, § 350. Community of property can only arise from provincial laws or statutes when these are in force at the place where the consorts establish their first domicile after the consummation of the marriage.

§ 351. The change of this first domicile does not, as a rule, make any change in the laws to which the consorts have previously submitted themselves.

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* Lib. cit., pp. 243 244.

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§ 352. If however the consorts change their domicile from a place where community does not prevail to one where it prevails, all transactions entered into by them at the latter place must be judged, in relation to third persons, by the rules of community.

§ 353. What is above laid down concerning a change of domicile by the consorts also holds concerning other changes of the jurisdiction to which they were subject at the time the marriage was celebrated.

§ 354. At places where community of property is not established by provincial laws or statutes, it can be introduced by contract only previous to the consummation of the marriage.

§ 355. But when the consorts have changed their domicile from a place where community does not prevail to one where it prevails, they can submit themselves to it by contract, even with regard to their respective successions. (§ 352.)

It will be observed that in §§ 352, 353, the Prussian code shews the same care as with regard to capacity (see above, p. 29) for the security of persons who contract with others in ignorance of the personal condition of the latter as resulting from the laws of other places.

The fuller reference which has here been made to foreign authorities was rendered advisable by the meagreness of the English ones, to which I now return.

§ 86. In the absence of express contract, the law of the matrimonial domicile regulates the rights of the husband and wife in the movable property belonging to either of them at the time of the marriage, or acquired by either of them during the marriage. By the matrimonial domicile is to be understood that of the husband at the date of the marriage, with a possible exception in favour of any other which may have been acquired immediately after the marriage, in pursuance of an agreement to that effect made before it.

The English authorities presently to be cited do not go further than to support the law of the domicile in a general sense. But the weight of principle seems to be so clearly in favour of the views advocated by Savigny, and adopted by statute for Scotland, that much is not probably adventured in framing the § as above, and predicting that, when cases arise on which the point can be tried, the law of the domicile referred to will be declared to be that of the matrimonial domicile, even although another domicile may have been

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adopted between the date of the marriage and that when the property in question was acquired.

This principle has been adopted in the Married Women's Property Scotland Act (1881), st. 44 & 45 Vict., c. 21, of which s. 1, Nos. (1) and (5), are as follows: "(1) Where a marriage is contracted after the passing of this Act, and the husband shall at the time of the marriage have his domicile in Scotland, the whole movable or personal estate of the wife, whether acquired before or during the marriage, shall by operation of law be vested in the wife as her separate estate, and shall not be subject to the *jus mariti*. (5) Nothing herein contained shall exclude or abridge the power of settlement by antenuptial contract of marriage."

Sawer v. *Shute*, 1792, 1 Anstr. 63, Court of Exchequer. This is perhaps the case referred to by Lord Loughborough in *Campbell* v. *French*, 1797, 3 Ves. 323, and supposed by him to have been decided by Lord Thurlow. *Dues* v. *Smith*, 1822, Jacob 544, Plumer; *McCormick* v. *Garnett*, 1854, 5 D. M. G. 278, Knight-Bruce and Turner; *De Serre* v. *Clarke*, 1874, L. R., 18 Eq. 587, Malins. No change of domicile was in question in any of these cases, but in *Watts* v. *Shrimpton*, 1855, 21 Beav. 97, Romilly, a British subject domiciled in France married an Englishwoman in the British ambassador's chapel at Paris, and afterwards became naturalized as a Frenchman. The discussion arose about money to which the wife became entitled after such naturalization, and which was not comprised in an agreement which had been entered into on the marriage. Therefore a change of the personal law was in question, if political nationality should be accepted as the test of that law, but not if domicile should be taken as the test. The judge said: "I am of opinion that the marriage contract was English, and that the English law regulated the rights of the husband and wife at the time of the marriage; that, consequently, property coming to the wife subsequently must be dealt with according to the English law by the courts in this country, which have a dominion over the fund, although the husband is now a domiciled Frenchman." The last expression should have been "a naturalized Frenchman," and on the whole it appears that the personal law was treated as governing the rights, even after a change in that law. But the circumstance that the personal law was not placed on the footing of domicile, if indeed the use of the word "domiciled" instead of "naturalized" does not betray that the judge took a different view of the facts from that presented in the report, and the reference to the dominion over the fund, as though it were an element in the decision, render it impossible to cite the case with confidence as an authority on the question arising from a change of domicile after marriage. See below, p. 71.

With regard to the suggested extension of the term "matrimonial domicile," see above, p. 36; the Prussian code, part 2, title 1, § 350, quoted above, p. 67; and below, § 40, where it will be seen that English authority exists for the extension in the case of an express matrimonial contract.

If the marriage be accompanied by a settlement, or express con-

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tract relating to property, the validity of such settlement or contract, and the rights of the parties under it, will be determined on the same principles which would apply to any other contract made at a given place and contemplating a performance in the matrimonial domicile.

§ 87. Hence the formal requisites of a marriage settlement or contract will generally depend on the law of the place where it is made, the *lex loci actus*.

In *Guépratte* v. *Young*, 1851, 4 De G. & S. 233, where however the contract was not one on marriage, Knight-Bruce quoted, as "generally true," the maxims: *si lex actui formam dat, inspiciendus est locus actus, non domicilii; si de solemnibus quæritur aut de modo actus, ratio ejus loci habenda est ubi celebratur.*

Here however a practical difficulty often arises. Art. 1394 of the Code Napoleon requires that "all marriage contracts shall be made before the marriage by notarial act." Suppose an Englishwoman marries a Frenchman domiciled in France, and that her fortune comprises money vested in English trustees under the trusts of an English will or settlement, she and her friends, and their English solicitor, naturally wish that any disposition which on her marriage may be made of her fortune should be made by a deed in the English language and form, not only as being more intelligible to themselves, but as being also more intelligible to the trustees of the will or settlement under which her fortune is held, who will one day have to act on the disposition now to be made. The proper course would be to execute such a deed, and incorporate it besides in a notarial act, so as to satisfy every possible requirement. But the notarial act is omitted, from haste or thoughtlessness. Will the English deed, which alone is executed, be operative? If it was executed in France, it does not satisfy the *lex loci actus*: if in England, and it should appear that the requirement of a notarial act is held in France to be a stringent rule of domestic policy, excluding the usual maxims of private international law, will the deed be permitted to operate in England when operative force is denied to it by the law of the matrimonial domicile, which generally regulates the rights of the husband and wife in movable property? Such cases have been dealt with in this country with a strong disposition to give effect to the intention of the parties, and with that

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disregard of the *lex loci actus* which has been noticed above, p. 10, as characteristic of the English treatment of the subject.

In *Van Grutten* v. *Digby*, 1862, 31 Beav. 561, Romilly, where the deed in English form was executed in France, the judge said: "I hold it to be the law of this country that if a foreigner and Englishwoman make an express contract previous to marriage, and if on the faith of that contract the marriage afterwards takes place, and if the contract relates to the regulation of property within the jurisdiction and subject to the laws of this country, then and in that case this court will administer the law on the subject as if the whole matter were to be regulated by English law:" p. 567. This may be compared with the reference made by the same judge to the circumstance of his court having dominion over the fund, as a ground of decision in a case where the fund was not comprised in the contract made on the marriage: *Watts* v. *Shrimpton*, above, p. 69.

§ 38. But if the marriage settlement or contract relates to English land, it cannot operate as a conveyance unless it is in proper English form for that purpose, although, if otherwise valid, it will have with regard to the land whatever operation it may be entitled to as a contract.

§ 39. Pursuing the principle which was enunciated immediately preceding § 37, the legality and operation of a marriage settlement or contract, when its meaning has been ascertained, and generally its interpretation also, will be referred to the law of the matrimonial domicile. No interests however can be created in English land but such as English law permits.

This is a convenient place for giving an elementary notion of interpretation, as private international law is concerned with it. Interpretation is a question of fact. *Primâ facie*, the law of the place of contract will furnish the most proper clue to the meaning of the parties. If they have used words which there are technical, or have mentioned coins, weights, or measures which under the same name have a different value there and elsewhere, it is the technical sense or the value of that place which they are most likely to have contemplated. Whatever they have not mentioned, yet must necessarily have had in mind, they most likely intended to follow according to the law of the same place, or the usages there prevailing. Yet these are but presumptions, and therefore liable to be rebutted: If the agreement expressly stipulate for a performance elsewhere,

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the usages and technical language of the latter place, at least in all that relates to the performance, are more likely to have been present to the minds of the contractors than those of the place of contract. Still more will this be the case if the place of performance be in the country from which both parties derive their personal law. And in the first edition, p. 174, I said it was conceivable—now I may say that the Italian code, see above, p. 86, is certainly right in laying down—that the common personal law of the parties will, even without the circumstance of a stipulated performance in its country, afford a safer guide to their meaning than the law of the merely casual place of contract. On all these points, the greatest writers on private international law have abstained from laying down sweeping presumptions, applicable to every description or example of agreement. But there can be no doubt that, generally, the interpretation of a marriage settlement or contract will be referred in England to the law of the matrimonial domicile, as being the place in which the performance of the contract is contemplated, and that from which the personal law of one party at least is derived.

Interpretation of a power to charge, on marriage, an annual sum on land in Ireland, and of the execution of that power, the domicile being in England. "If this were the case of a simple charge of £3000 on lands in Ireland, the place of contract, the domicile of the parties, the place appointed for payment, and other circumstances might require consideration, and would furnish the ground for the decision of the case; but the instrument itself must in this case give the rule of decision—a settlement making various arrangements, some like to the provision in question, others different from it:" Eldon; *Lansdowne* v. *Lansdowne*, 1820, 2 Bligh 60, 87. A marriage contract was made between persons domiciled in Scotland, and an equity was afterwards alleged to exist for a settlement out of a fund comprised in such contract. The operation of the contract by Scotch law was held to govern the case. *Anstruther* v. *Adair*, 1834, 2 M. & K. 513, Brougham. A marriage settlement construed partly according to English law and partly according to Scotch, in obedience to the plain intent of the settlement itself: *Chamberlain* v. *Napier*, 1880, 15 Ch. D. 614, Hall. A husband is trustee in England for his wife of property which belongs to her separately under a foreign marriage settlement of which there is no trustee: *Exp. Sibeth, re Sibeth*, 1885, 14 Q. B. D. 417; Brett, Cotton, Lindley.

It is not easy to see how a change of domicile, important as are the questions it raises with regard to the matter of § 36, can give rise to any question as to the operation of an express contract. But in *Duncan* v. *Cannan*, 1854, 18 Beav. 128, Romilly, and 1855, 7 D. M. G. 78, Knight-Bruce and Turner, the matrimonial domicile was Scotch, and it was admitted that Scotch law governed. Under the contract, as operating by that law, the wife's concurrence in a receipt for a sum of money comprised in the contract was

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assumed to be necessary, and, if necessary, would certainly be effectual. She concurred in such a receipt after the domicile had been transferred to England, by the law of which country her receipt would be ineffectual, having regard to the words of the matrimonial contract, though by mentioning separate use the contract might have made her receipt effectual under the law of England. It was argued that Scotch law adopts the rule of private international law which determines capacity according to the actual domicile; that the wife, by the law of her actual domicile, wanted capacity to give a receipt; and that her receipt was therefore ineffectual. But all three judges held it to be effectual. There is no magic in the word "capacity." That which a person has capacity to do is simply that which he can effectually do; and his capacity, spoken of collectively, is the total of his abilities to do different things effectually. The matrimonial contract in this case gave the lady a pecuniary benefit, and the question whether she could still receive it after the change of domicile was identical with the question raised about her capacity; they were not two questions, admitting of the former being solved by help of the answer to the latter. In *Guépratte* v. *Young* (see above, p. 47), the question of capacity related to the making of a new agreement.

§ 40. Where the marriage takes place on the faith of an agreement that the husband shall transfer his domicile to another country, the law of the latter country governs the legality and operation of an express matrimonial contract as to property.

Colliss v. *Hector*, 1875, L. R., 19 Eq. 334, Hall.

§ 41. If a settlement or express contract is made on the marriage, not comprising all the movable property of both consorts, the question whether it excludes any rights which would otherwise arise in the part not comprised in it will be decided by the law of the matrimonial domicile, as appropriate both to the operation of the settlement or contract and to the destination of the property on which it has no operation.

See *Watts* v. *Shrimpton*, above, p. 69.

§ 42. It is admitted in principle that the succession to either consort on death must be separated from the effect of marriage on property, and be regulated by the law of the last domicile of the deceased. In practice however there is occasionally some difficulty, on the question what points belong to the department of succession and what to the pecuniary effects of the marriage.*

* See Savigny, syst. d. heut. Röm. rechts, § 379; Guthrie's translation, p. 247.

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In *Foubert* v. *Turst*, 1702, Pre. Cha. 207, and 1703, 1 Bro. P. C. 38 fol., 129 oct., the consorts were in community under an antenuptial contract, except as to a sum of 800 *livres*, which was to "be the proper estate of the wife and her heirs of her part." There was also a postnuptial contract, which appears to have been held inoperative. The wife predeceasing the husband, and without issue, after a removal of the domicile from the custom of Paris to England, "her heirs of her part" according to the custom were of course entitled, by contract, to the 800 *livres*; but the husband, as successor to his wife by the law of England, claimed her share in the community as to the rest; while her relations claimed this also, evidently on the ground that the antenuptial contract had been made with the intervention of the wife's mother, who should therefore be considered as having stipulated for them by implication, when she stipulated for the community in return for the portion which she gave with her daughter. Lord keeper Wright repelled this implication, holding that a contract, which so far as it went coincided with the custom of Paris, must be taken as an adoption of the custom. But his decree was reversed in the house of lords, and the wife's share in the community given to the heirs of her part, on their counsel pointing out that in certain particulars, collateral to the stipulation of community, the contract deviated from the custom of Paris, whence it was argued that it could not in any part be considered as an adoption of it. The contract was probably most correctly interpreted by the higher court; but if the antenuptial contract had been between the husband and wife alone, with no particular reason for implying a stipulation in favour of her relations, or if the parties had married under the custom of Paris without express contract, there is no reason to suppose that the house of lords would not have held the husband entitled, as successor to his wife by the law of her last domicile, to the share in the community which the contract, or the law of the matrimonial domicile, would have given her on her death. In *Lashley* v. *Hog*, 1804, 1 Robertson's Sc. Ap. Ca. 4, lord Eldon said of *Foubert* v. *Turst* that "if there had been no contract the law of England would have regulated the rights of the husband and wife, who were domiciliated in England, at the dissolution of the marriage." This dictum has been quoted in favour of the new as against the matrimonial domicile, in the question which arises between them on the matter of § 36: but it is not likely that lord Eldon meant anything of that kind. In *re Hernando*, *Hernando* v. *Sawtell*, 1884, 27 Ch. D. 284, Pearson, a question again arose as to the rights of succession, having regard to the terms of the marriage settlement.

Divorce.

Two causes affecting the tie of marriage, jactitation of marriage and nullity of marriage, and two affecting the personal relations of the parties during the continuance of that tie, divorce *a mensa et toro* and restitution of conjugal rights, were ancient subjects of ecclesiastical jurisdiction. That is to say, the jurisdiction in them was exercised by the courts of bishops who acknowledged each other, and were acknowledged by the secular power in their respec-

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tive countries, as officers of the same church; the laws administered in those courts were kept uniform by a common appeal to the pope; and the same laws distributed suits among those courts by rules of competence as authoritative as those which the law of England lays down for the competence of different county courts, or the law of France for that of the tribunals of first instance. As long as this state of things continued, and between countries in which it continued, no question similar to those of private international law could arise about the causes in question. But in consequence of the reformation, the English bishops ceased to be officers of the same church with the continental bishops; an appeal from their courts to the crown was substituted for one to the pope; and divorce *a vinculo*, which the church did not grant at all, came to be granted by private act of parliament, but with a regularity in the procedure for obtaining it which in the opinion of the best authorities caused it to rank among legal remedies. And by the "act to amend the law relating to divorce and matrimonial causes in England," st. 20 & 21 Vict., c. 85, which came into operation in 1858, the episcopal jurisdiction in the matrimonial causes which had belonged to it was transferred to the crown, the name of divorce *a mensa et toro* was changed to judicial separation, and the procedure for divorce *a vinculo* was transferred from parliament to a regular court. In the mean time, the reformation in Scotland had led at a much earlier date to the transfer of the episcopal jurisdiction in matrimonial causes to the crown, and the establishment of judicial procedure for divorce *a vinculo;* and changes more or less similar have taken place at different times almost throughout the civilized world. Hence matrimonial causes now afford as prolific a field as any other for the questions of law and jurisdiction which constitute private international law. Among those questions it will be convenient to take first those relating to jurisdiction, and among these again to take the foundation which the English court will require and deem sufficient for the exercize of its own jurisdiction, before the foundation which it will require and deem sufficient in order that a foreign sentence may be treated by it as valid. The question of the cause for which a divorce will be granted will come last.

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The act of 1857, which I shall call the matrimonial causes act, was silent as to the conditions of competence in the causes which it transferred from the bishops to the crown: therefore the old ecclesiastical rules, as they had come to be understood and applied in England, continue to govern. It is also silent as to the conditions of competence in the matter which had previously been of parliamentary cognizance, divorce, by which term I shall intend divorce *a vinculo* where it is not otherwise expressed. On the appeal in *Niboyet* v. *Niboyet*, 1878, 4 P. D. 1, it was held by lords justices James and Cotton against Brett that the latter conditions also must now be taken from the ecclesiastical rules relating to one or more of those other matrimonial causes which were subject to such rules. And to the arguments there used this may certainly be added, that inasmuch as the parliamentary cases had been too few to establish a definite system with regard to the conditions for granting divorce, the matrimonial causes act could not possibly have contemplated that any such conditions should be transferred, together with the procedure, to the court which it established. But whether, either therefore or for any other reason, it ought to have been inferred that, in the contemplation of the act, the wanting conditions were to be drawn from those existing in any and what other matrimonial cause, is a question that needs not to be discussed here. The best introduction to the statement which I must attempt to give of the English rules will consist of the words of the judges who formed the majority, omitting merely argumentative passages as far as possible.

"Residence," said lord justice James, "as distinct from casual presence on a visit or *in itinere*, no doubt was an important element; but that residence had no connection with, and little analogy to, that which we now understand when we endeavour to solve what has been found so often very difficult of solution, the question of a person's domicile. If a Frenchman came to reside in an English parish, his soul was one of the souls the care of which was the duty of the parish priest, and he would be liable for any ecclesiastical offence to be dealt with by the ordinary *pro salute animæ*. . . . . The wrong done in his diocese, the offending party openly and scandalously violating the laws of God and of the church in his diocese, why should he decline to interfere? . . . . . If I were asked to define, and it were necessary to define, what in the particular case of matrimonial infidelity constituted a matter matrimonial in England at the time when the act was passed, I should define it to be a case of infidelity

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where the matrimonial home was in England—the matrimonial home in which the offended husband ought to be no longer bound to entertain the unchaste wife, or in which the chaste and offended wife ought to be no longer bound to share the bed and board of the polluted husband—the matrimonial home the purity of which was under the watch and ward of the church there. I will give two illustrations of my meaning. It appears to me impossible to suppose that an English court would lose its jurisdiction, or not have jurisdiction, because the guilty party consorted with his or her paramour outside the territorial limits of the diocese, or on a journey. And, on the other hand, I do not think that an English court ought to have exercised or would have exercised jurisdiction in the case of a French matrimonial home, by reason of an act of infidelity done during a visit, or in transit to or through the English diocese. . . . . I do not think that I am overruling any English case in holding that on the facts stated in this petition the wife is entitled to the relief she asks, or in laying down that where and while the matrimonial home is English, and the wrong is done here, then the English jurisdiction exists and the English law ought to be applied."

The tendency of the above judgment is to identify the jurisdiction for divorce with that for judicial separation, and to make both depend on residence, as distinct from domicile. The second and fourth of the passages cited would seem to lay stress on the adultery having been committed in England, but the third passage appears to negative that conclusion.

"Has this court," said lord justice Cotton, "jurisdiction to entertain a petition for restitution of conjugal rights, or for a judicial separation, presented by one of two married persons against the other, where both are resident though not domiciled in England, and where the breach of the matrimonial compact has been committed in England either by refusal to cohabit or by adultery? . . . . . I see no reason for supposing that an ecclesiastical court, acting *pro salute animæ*, would have declined to interfere against an offending husband or wife in respect of an act committed within the local limits of its jurisdiction, because the parties though resident within those limits were domiciled elsewhere. . . . . No doubt the words 'any husband and any wife'" [occurring in the divorce portion of the matrimonial causes act] "must be subject to some limitation. They cannot be considered as giving to a husband or wife resident and domiciled abroad a right to petition against a wife or husband neither resident nor domiciled here; but in my opinion this section gives to any husband or wife who under the earlier provisions of the act" [those transferring the ecclesiastical jurisdiction to the crown] "would have a right to apply to the court for relief, power to present a petition for the remedy" [divorce] "given by ss. 27 and 31 . . . . . A decision that to give the court jurisdiction as against a respondent not resident in England it is necessary to prove that his domicile is in this country does not establish that, where there is residence in England, there must also be domicile here."

The tendency of this judgment is to assert a jurisdiction for

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divorce wherever there would be one for judicial separation or restitution of conjugal rights, and to make either residence or domicile, but not both, necessary for it. The commission of the wrong in this country is also mentioned, but not so as to make it clear that the learned judge thought it a necessary element.

The conditions under which the Scotch courts assume jurisdiction to grant a divorce may be studied in the following leading cases. *Warrender* v. *Warrender*, 1835, 2 Cl. & F. 488, Brougham and Lyndhurst: *Pitt* v. *Pitt*, 1862, 1 D. 3rd Ser. 106; Kinloch, Inglis, Cowan, Benholme, Neaves; 1864, 4 Macq. 627, Westbury, Chelmsford and Kingsdown: *Stavert* v. *Stavert*, 1882, 9 D. 4th Ser. 519; Lee, Inglis, Deas, Mure, Shand. See also Fraser on Husband and Wife according to the Law of Scotland, 2nd edn., 1878, pp. 1276 *et seq.*

I now proceed to the English rules on the subject.

§ 43. The place where the marriage was contracted is of no importance with regard to the authority of the English court to grant a divorce.

§ 44. When the husband, being either petitioner or respondent, is domiciled in England, the court has authority to grant a divorce, wherever the adultery was committed, or, if the husband be respondent, wherever the adultery and cruelty or desertion were committed.

Ratcliff v. *Ratcliff*, 1859, 1 S. & T. 467; Campbell, Cresswell, Martin: *Wilson* v. *Wilson*, 1872, L. R., 2 P. & M. 435, Penzance. In each of these cases the marriage was contracted and the adultery committed abroad, and the second case is remarkable because the husband, who was the petitioner, had acquired an English domicile only after the adultery, and it does not appear that the wife had ever been in England. It therefore decides, for England, as *Warrender* v. *Warrender*, 2 Cl. & F. 488, decided for Scotland, the possibility of founding jurisdiction in divorce against the wife on a domicile imputed to her by a rule of law. *Bond* v. *Bond*, 1860, 2 S. & T. 93; Cresswell, Martin, Willes; husband respondent.

§ 45. When the husband, being either petitioner or respondent, though not domiciled in England, is resident there, not on a visit or as a traveller, and not having taken up that residence for the purpose of obtaining or facilitating a divorce, the court has

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authority to grant a divorce, wherever the adultery was committed, or, if the husband be respondent, wherever the adultery and cruelty or desertion were committed.

Brodie v. *Broaie*, 1861, 2 S. & T. 259; Cresswell, Wightman, Williams; husband petitioner. The marriage was contracted and the adultery committed abroad, and the wife's residence at the time of the suit was also abroad. The case therefore raised the question whether the husband's residence, not amounting to domicile, can be imputed to the wife so as to found jurisdiction against her; and it decided that question in a contrary sense to that in which I understand it to have been decided for Scotland by *Pitt* v. *Pitt*, above, p. 78. *Niboyet* v. *Niboyet*, 1878, 4 P. D. 1; husband respondent; James and Cotton, differing from Brett, and reversing Phillimore, 1878, 3 P. D. 52. See more as to this case, above, pp. 76—8; and particularly the doubt which arises on the opinions of the judges as to the importance of the place where the adultery was committed, a doubt which I have ventured to disregard in framing the text of this §.

Lord Penzance had been of opinion that a jurisdiction to divorce should not be assumed on the ground of a residence not amounting to domicile, saying: "when the case has been reversed, and when the courts of this country have had to consider how far persons who are domiciled Englishmen shall be bound by the decree of a foreign matrimonial court, the strong tendency has been to repudiate the power of the foreign court under such circumstances to dissolve an English marriage. It would be unfortunate if an opposite course should be followed by the courts of this country, when they are determining to what extent they will entertain the matrimonial suits of foreigners:" *Manning* v. *Manning*, 1871, L. R., 2 P. & M. 223; p. 226. And "It is the strong inclination of my own opinion that the only fair and satisfactory rule to accept on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another. It is not possible however to avoid to some extent collision with the courts of different countries, because, if the courts of every country adhered to domicile as the rule of jurisdiction, there would still remain the fact of domicile to be established; and as all countries do not adopt the same rules of evidence, the evidence on this question might be very different in one country to what it might be in another;" in *Wilson* v. *Wilson*, quoted above under § 44. The remark on the uncertainty attending the fact of domicile suggests the question whether the British legislature would not be wise in enacting, in accordance with the modern tendency, that political nationality shall, as far as possible, be the criterion for personal law and jurisdiction. Lord justice Brett, on the appeal in *Niboyet* v. *Niboyet*, maintained the same views as lord Penzance, citing the authorities which establish that in the

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United States the jurisdiction on divorce is held to be founded exclusively on domicile.

§ 46. When the husband, being either petitioner or respondent, is not domiciled in England, or resident there within the terms of § 45, the wife's residence there within the terms of the same § will not give the English court jurisdiction to grant a divorce, except in favour of a wife deserted by her husband, or whose husband has so conducted himself that she is justified in living apart from him, and who up to the time when she was deserted or began to be so justified was domiciled or resident with her husband in England.

The doctrine asserted in this §, other than the exception, would of course receive the assent of all those who make the jurisdiction for divorce depend on domicile. It would also result from the condition that the matrimonial home should be in England, which is required in the opinion of lord justice James, above, p. 76. The authorities on the exception follow.

In *Deck* v. *Deck*, 1860, 2 S. & T. 90; Cresswell, Martin, Willes; a divorce was granted to the wife under the circumstances stated in the exception, the husband having become domiciled in the United States, and Cresswell, in delivering the judgment of the court, put it on the ground of the wife's political nationality being British. On the same day the same judge delivered the judgment of himself and the same colleagues in *Bond* v. *Bond*, 2 S. & T. 93, in which the point of the wife alone being domiciled or resident in England did not arise, since it was held that the husband's domicile was to be treated as English; and the case was stated to be the same in substance as *Deck* v. *Deck*. It appears therefore that the decision in *Deck* v. *Deck* had nothing to do with the wife's having had an English domicile or residence with her husband up to the time when she began to be justified in living apart from him, which indeed is scarcely noticed in the judgment, and that it might have been cited for the broad proposition that the English jurisdiction in divorce is accessible to all British subjects once domiciled in England, and not actually domiciled in any other British country. For such a proposition however there is no other authority. In *Yelverton* v. *Yelverton*, quoted below under § 48, Cresswell distinguished the case of a wife with a separate residence seeking to be released from the marriage tie from that of her seeking to enforce it: p. 591 of the report. Consequently it does not appear that we possess any clear utterance of that judge on the subject of this §. In *Le Sueur* v. *Le Sueur*, 1876, 1 P. D. 139, Phillimore, a divorce was refused to a wife who since her desertion had come to reside in England in such a manner that had she been *sui juris* she would have acquired a domicile there, her husband's domicile not having been English either before or after the desertion; and lord Penzance refused to allow any validity to a foreign divorce in a parallel case. See below, § 51. But in *Santo Teodoro* v.

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Santo Teodoro, 1876, 5 P. D. 79, Phillimore, where also the domicile was foreign throughout, a divorce was granted to a wife who continued to reside in England, in which country there had been a matrimonial home previous to the cause of divorce arising, though the husband had left it. Lord justice Brett, in *Niboyet* v. *Niboyet*, said: "the case of an adulterous husband deserting his wife, by leaving the country of his domicile and assuming to domicile himself in another, might seem to raise an intolerable injustice; but we" [the learned judge spoke for himself only] "cannot help thinking that in such case, if sued by his wife in the country in which he had left her, he could not be heard to allege that that was not still the place of his married home, that is, for the purpose of that suit, of his domicile."

§ 47. The jurisdiction of the English court to decree judicial separation depends on the same circumstances as its jurisdiction to grant a divorce.

This is necessarily the view of those who, like the majority of the court of appeal in *Niboyet* v. *Niboyet*, determine the latter jurisdiction by identifying it with the former, as deduced by them from the ancient ecclesiastical practice. And those who make divorce depend strictly on domicile limit the jurisdiction for judicial separation with equal strictness, on the ground of legal principle without reference to ecclesiastical practice.

It was in a suit for judicial separation, *Manning* v. *Manning*, that lord Penzance made some of the remarks on the jurisdiction for divorce which are quoted above, p. 79. And lord justice Brett, in *Niboyet* v. *Niboyet*, after laying down the rule of domicile for divorce, proceeded thus. "The same rule, I confess, seems to me to apply for the same reason to its," the English court's, "power to grant any relief which alters in any way that relation between the parties which arises by law from their marriage. It applies therefore, as it seems to me, to suits for judicial separation and to suits for the restitution of conjugal rights. I do not think it does apply to suits for a declaration of nullity of marriage, or in respect of jactitation of marriage." 4 P. D. 19.

If the matter be considered on the ground of social rather than of legal principle, a doubt may be suggested whether it is necessary to identify the jurisdiction for judicial separation with that for divorce. The former decree leaves the parties man and wife, but gives to the injured party a protection against some of the consequences of that status; and it may therefore be reasonable to allow its benefit to be enjoyed within the territory by those who are resident in it, even

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though the court of their country or domicile should alone be held competent to dissolve the tie of marriage between them.

§ 48. The English court has jurisdiction to decree restitution of conjugal rights where both parties are in England at the time of the commencement of the action, but otherwise its jurisdiction for that purpose depends on the same circumstances as its jurisdiction to grant a divorce.

What has been said in the last § on the jurisdiction for judicial separation may be repeated here as to the latter part of this §, *mutatis mutandis*, including the doubt whether a remedial decree, not affecting the marriage tie, need be limited by domicile, even should that limitation be established for divorce.

Yelverton v. *Yelverton*, 1859, 1 S. & T. 574, Cresswell; where it was held that a wife cannot obtain a decree of restitution, the husband being neither domiciled nor resident in the country, notwithstanding her own residence in it since his desertion of her. *Firebrace* v. *Firebrace*, 1878, 4 P. D. 63, Hannen, where "the difficulty, amounting in most cases to an impossibility, of enforcing the decree of the court" against a respondent neither domiciled nor resident in the country, was referred to as a reason for not claiming jurisdiction over a husband who had failed in rendering conjugal rights to his wife while he was here; and where it was held that the matrimonial causes act gives no power to serve a petition for the restitution of conjugal rights out of England. See also the quotation from lord justice Brett under § 47.

There is jurisdiction where both parties are in England at the time of the commencement of the action: *Thornton* v. *Thornton*, 1886, 11 P. D. 176; Cotton, Bowen and Fry, affirming Butt.

§ 49. The jurisdiction of the English court in suits for a declaration of nullity of marriage, or in respect of jactitation of marriage, depends on the defendant's being resident in England, not on a visit or as a traveller, and not having taken up that residence for the purpose of the suit.

Williams v. *Dormer*, 1851, Fust, and 1852, Dodson, 2 Robertson, 505. "A decree of nullity of a pretended marriage is quite as much a decree *in rem*" [as one of divorce], "and has all the consequences. How would it be possible to make domicile the test of jurisdiction in such a case? Suppose the alleged wife were the complainant, her domicile would depend on the very matter in controversy. If she was really married, her domicile would be the domicile of her husband; if not married, then it would be her own previous domicile." Lord justice James, in *Niboyet* v. *Niboyet*, 4 P. D. 9. And see the quotation from lord justice Brett in the same case, under § 47. Thus both sides to the controversy on § 45 are agreed as to this §.

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But the alleged wife, being defendant and maintaining the marriage, is bound by her own contention to submit to the jurisdiction of the petitioner's domicile: *Chichester* v. *Donegal*, 1822, 1 Add. 5, at p. 19, Nicholl.

§ 50. A divorce pronounced by a foreign court is treated as valid in England when, and only when, the parties were domiciled within the jurisdiction of that court at the time of the suit in it.

See *Harvey* v. *Farnie*, where a Scotch divorce was treated as valid in England on the ground of domicile, quoted below, p. 87. The limitation here stated is perhaps not certain. As might have been expected, recognition was refused to a foreign divorce founded only on a residence not amounting to domicile, and taken up for the purpose of obtaining or facilitating the divorce, in *Dolphin* v. *Robins*, 1859, 7 H. of L. 390, Cranworth, Kingsdown, Campbell; affirming *Robins* v. *Dolphin*, 1858, 1 S. & T. 37, Cresswell; and in *Shaw* v. *Gould*, 1868, L. R., 3 E. & I. A. 55, Cranworth, Chelmsford, Westbury, Colonsay. But in neither of those cases was any thing positive said, and in the latter of them Chelmsford and Colonsay expressly reserved their opinion, as to the effect of a foreign divorce founded on a residence such as described in § 45. The exact point appears to have arisen, and the limitation stated in the § was applied, in *Tollemache* v. *Tollemache*, 1859, 1 S. & T. 557, Cresswell, Williams, Martin. And having regard to lord Penzance's description of the tendency of English courts, quoted above, p. 79, from his judgment in *Manning* v. *Manning*, and to the stress laid on domicile in *Harvey* v. *Farnie*, I venture to state it.

Foreign or colonial divorces were held valid on the ground of domicile in *Scott* v. *Att.-Gen.*, 1886, 11 P. D. 128, Hannen, and *Turner* v. *Thompson*, 1888, 13 P. D. 37, Hannen. In the latter case the foreign decree of dissolution was pronounced for a cause which in England would have given occasion for a sentence of nullity. In the former case, although the colonial law which granted the divorce *a vinculo* did not permit the remarriage of the guilty party, the wife, being such party and having afterwards acquired an English domicile, was held free to remarry.

§ 51. Not even where the husband had deserted the wife, or so conducted himself that she was justified in living apart from him, will a divorce obtained by her in a country which was not that of his actual domicile be treated as valid in England. "Actual domicile or residence" must be read here, if the preceding § be deemed too strict in requiring domicile as the only foundation for a foreign divorce.

This question is the counterpart of one which was discussed under § 46 for the jurisdiction of the English court.

In *Shaw* v. *Att.-Gen.*, 1870, L. R., 2 P. & M. 156, Penzance, recognition was refused to a foreign divorce obtained under the circumstances here considered; but it was observed in the judgment that the husband had had no notice of the

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divorce suit, "except an advertisement which he never saw and was never likely to see," and that that suit had been brought in a country in which he had never been domiciled or resident. See lord justice Brett's opinion, where the suit is brought in the husband's old domicile, above, p. 81. Having regard however to the greater hesitation which the court appears to show in recognizing foreign divorces than in granting English ones, I have ventured to frame the § as a statement.

§ 52. Divorce can only be pronounced for cause sufficient by the *lex fori*; and when cause sufficient by the *lex fori* exists, the jurisdiction being established under the rules already considered, divorce cannot be refused because it would be refused either by the *lex loci contractus* of the marriage, or by the personal law of the parties at the time of the marriage, or by the law of the place where any fact occurred on which the application for a divorce is grounded, or by the personal law of the parties at the time when any such fact occurred. This doctrine is received in England, both for granting divorces there and for recognizing the validity of foreign divorces.

The complete dependence of the cause for divorce on the *lex fori*, in the estimation of any country the law of which allows of divorce at all, results from the reservation in favour of all stringent domestic policy which is understood in private international law; see above, p. 39. The only law, except that of the forum, the claim of which to decide on the cause of divorce can be advanced with much plausibility, is the personal law of the parties derived from their matrimonial domicile. Representing marriage as a contract made at a given place, with contemplated performance in the matrimonial domicile, it may be said that the substance of the marriage, including the causes of its possible dissolution, must be affected by the place of contemplated performance to the same extent to which that place affects the operation of the marriage, or of any contract collateral to it, on property. The answer is that the substance of the marriage is not left to the choice of the parties, like its operation on their property. They are free to contract the marriage, but not to modify its substance. The existence of the marriage is an effect of contract, but its terms are not. The parties contract a mutual relation on some of the particulars of which different views are held in different countries, but as to which all nations agree in thinking it

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to be of the utmost social importance that all its particulars shall be determined by law.

In England, the propriety of putting in force our procedure for the dissolution of a marriage has never been disputed on the ground that a foreign law, having any possible relation to the matter, would either not divorce for the cause in question, or even would refuse to divorce at all. There are however authorities to the effect that what is called in them an English marriage cannot be dissolved by a foreign decree, for any cause for which it would not be dissoluble in England; and these authorities are complicated by an argument which used to be put forward when the English procedure for divorce was by private act of parliament, namely that English law, law being taken for the purpose of the argument in a narrow sense, did not admit divorce at all, and that therefore an English marriage was not dissoluble for any cause by a foreign decree. It will presently be seen to what extent the cases justify the statement in the §, that no limitation is now placed in this country on the cause for which any marriage can be dissolved by a competent court, so that the dissolution may be treated here as valid. But in the mean time a remark must be made on the circumstance that the cases referred to designate the marriages, as to the dissolution of which abroad the doubt arose, as English marriages. It would have been consistent with the extent to which domicile is now allowed by our courts to be influential with regard to marriage—see above, §§ 21, 25—to hold that the sufficiency by English law of the cause for divorce was a question affecting the divorce of persons domiciled in England at the date of the foreign decree. The matrimonial domicile, as before observed, could not properly be introduced into the question, but the domicile, if any, which should govern with regard to a change of status, whether to or from marriage, would be that existing at the time of the change asserted. But the marriages on which the argument that they were not dissoluble by a foreign decree for a cause insufficient by English law, or even at all by any foreign decree, used to be urged before the passing of the matrimonial causes act, were those which had been contracted in England. This will appear the less surprising to any one who will consider what con-

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fused notions on the international bearings of marriage are displayed in some of the earlier English cases, or the excessive breadth of the reference to the *lex loci contractus*, quoted from *Dalrymple* v. *Dalrymple* under § 19.

In *Lolley's case*, 1812, Ru. & Ry. 237, all the judges were "unanimously of opinion that no sentence or act of any foreign country or state could dissolve an English marriage *a vinculo matrimonii*, for ground on which it was not liable to be dissolved *a vinculo matrimonii* in England." Lolley's first marriage was contracted in England, and his domicile at its date was English; but it is to the former point alone that the term "English marriage," in the above resolution, has always been understood to refer, and was certainly meant to refer. He was divorced in Scotland, where he had only a very transient residence, at the suit of his wife, for his adultery, without the aggravating circumstances which in a very few cases induced parliament to grant to the wife a divorce by private act; and it is evidently to this that the resolution alludes, in speaking of a divorce for ground on which a marriage was not liable to be dissolved in England. The careful wording implies the opinion, which has been expressly adopted by the highest authorities, that divorce by private act of parliament was essentially a judicial proceeding, and that it would have been an error, even in 1812, to say that divorce *a vinculo* was not known to the regular course of English law. See lords Westbury and Colonsay, in *Shaw* v. *Gould*, 1868, L. R., 3 E. & I. A. 86, 91. Lolley married secondly in England, and was found guilty of bigamy: the conviction was sustained, after argument, by all the judges, who came to the resolution above cited, which in consequence of his continuing English domicile at the time of the divorce was not necessary to the decision of the case: and he was sent to the hulks for one or two years, the residue of the sentence being remitted. In *McCarthy* v. *Decaix*, 1831, 2 Ru. & My. 614, Brougham, the question arose incidentally in a suit about property. The cause of the divorce, which in this case was granted in the domicile, does not appear; but the learned chancellor thought himself bound to follow the resolution in *Lolley's case*, which he, while strongly objecting to it, extended, perhaps inadvertently, by interpreting it as deciding that a marriage contracted in England was indissoluble by any foreign proceeding, and therefore of course for any cause alleged in such proceeding. But the resolution in *Lolley's case* does not appear to have passed at any time without question. Lord Eldon, before whom *McCarthy* v. *Decaix* had been argued prior to its being heard by lord Brougham, had refused to ignore the divorce in the domicile without further assistance: 2 Ru. & My. 619. Then, by Lushington, in *Conway* v. *Beazley*, 1831, 3 Hagg. Eccl. 639; by Blackburne, lord chancellor of Ireland, in *Maghee* v. *McAllister*, 1853, 3 Ir. Ch. 604; and by Cranworth and Kingsdown, in *Dolphin* v. *Robins*, 1859, 7 H. L. 390; *Lolley's case* was treated as not concluding the point where the divorce is granted in the domicile, though the decisions in the first and third cases were against the validity of the divorce, which had not been granted in the domicile. In *Wilson's Trusts*, 1865, L. R., 1 Eq. 247, Kindersley revived Brougham's extension of the resolution in *Lolley's case*, and relied on it as against the foreign dissolution of a marriage which had been contracted in England before the matrimonial causes act came into operation;

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but when his judgment was affirmed on other grounds, *sub nom. Shaw* v. *Gould*, 1868, L. R., 3 E. & I. A. 55, Cranworth, Chelmsford, Westbury and Colonsay renewed the refusal to adopt the resolution even in its proper interpretation, and lord Westbury (p. 84) strongly urged the inconvenience of referring to the *lex loci contractus* of a marriage on the subject of divorce. In *Shaw* v. *Att.-Gen.*, 1870, lord Penzance said that *Lolley's case* had never been overruled, and referred to the grounds of divorce admitted in this country, as being possibly important with regard to the recognition in England of a divorce, granted in the actual domicile of the parties, from "an English marriage between English subjects," by which he probably meant a marriage in which both the *locus contractus* and the matrimonial domicile are English: L. R., 2 P. & M. 161, 2.

Now however the resolution in *Lolley's case*, and all reference to the causes for which a marriage is dissoluble in England when the question is about the validity to be allowed in this country to a foreign divorce, have been set aside, it may be supposed finally, by *Harvey* v. *Farnie*, 1880, 5 P. D. 153, Hannen; affirmed 1880, 6 P. D. 35, James, Cotton and Lush; affirmed again 1882, 8 Ap. Ca. 43, Selborne, Blackburn and Watson. See also *Briggs* v. *Briggs*, 1880, 5 P. D. 163, Hannen. In some of the judgments in these cases a desire was shown to save the credit of the famous resolution by interpreting the expression in it, "an English marriage," as referring to the matrimonial domicile and not to the place of celebration, and importing into it the further condition that the English domicile continues at the date of the foreign divorce. But, not to mention that the authorities nearest to the date probably knew best what was intended, and that a reference to the matrimonial domicile is not at all in the vein of that day, it may be remarked that such an interpretation would only shift the difficulty without getting rid of it. Criticism of texts by judges who consider themselves to be bound by the conclusions which they draw from them must always, with due reverence be it said, be taken *cum grano salis;* and the judgments in *Harvey* v. *Farnie* and *Briggs* v. *Briggs* plainly show that the real intention in these latest cases was to support the divorce pronounced in the actual domicile for whatever cause, irrespective as well of the matrimonial domicile as of the place where the marriage was celebrated. Lord justice James appears to have questioned whether the resolution in *Lolley's case* is correctly reported, thinking it rather in the style of lord Coke's time than in that of 1812: 6 P. D. 43, 44. But the difference from lord Coke's time is probably less due to the judges, who have always given their reasons, than t the reporters, who then put the substance of the reasons sententiously, and now report the speech from the bench as they would a speech from a platform. *Lolley's case* is no doubt one of the last reported in the old sententious style, but that is not a cause for doubting that, as we have it, the so-called resolution in it correctly singles out the points on which the judges laid the stress of their decision. It only remains to observe that in the judgments in *Harvey* v. *Farnie* will be found proof that lord Brougham's dicta in *McCarthy* v. *Decaix* were not called for by the matter before him. This is a converse error to that imputed to the reporter in *Lolley's case*, who at least did not travel outside the facts, but is accused of having indicated too precisely on which of the facts the judges relied.

The *lex loci contractus* of a marriage was also more or less vaguely referred to, with reference to the validity of a divorce from it, in the following cases from which no rule can be extracted. *Tovey* v. *Lindsay*, 1813, 1 Dow, 117, Eldon

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and Redesdale; *Ryan* v. *Ryan*, 1816, 2 Phil. Eccl. 332, Nicholl; *Connelly* v. *Connelly*, 1851, 7 Mo. P. C. 438, Lushington, in which case the validity of a separation *a mensa et toro* was in question; *Argent* v. *Argent*, 1865, 11 Jur. N. S. 864, Wilde; *Birt* v. *Boutines*, 1868, L. R., 1 P. & M. 487, Penzance.

Legitimacy.

The subject of legitimacy is one with regard to which it is impossible fully to carry out the maxim of determining questions of status by the personal law of the party concerned, for whether the criterion be domicile or political nationality, the personal law of a newly born child will generally be that of its father if it be legitimate, but if it be illegitimate will be derived from its mother or from the place of its birth. Hence in numberless cases a decision on the personal law can only be reached through a previous decision on the legitimacy. But every question of legitimacy must involve that of the validity of some marriage, and if the party concerned was born before the marriage it must involve the further question of the applicability to his case of a rule concerning subsequent legitimation existing in some national law. Also the validity of a marriage may depend on that of the divorce of one of the parties to it from a previous marriage, and thus the subject of legitimacy can be treated as a corollary to those of marriage and divorce, with an appendix relating to legitimation *per subsequens matrimonium*.

Different cases may occur on the remarriage of a divorced person during the life of his or her former consort. When it is the man who has been divorced and remarries, and at the date of his remarriage his personal law is that of a country in which, as well as in the *locus actus* of the remarriage, the whole series of transactions is held to be valid, it would seem to be an excess of refinement to make any objection on the ground that at the date of the divorce his personal law was that of a country in which the jurisdiction that granted the divorce would not be deemed internationally competent. He has changed his domicile or his political nationality between the dates of the divorce and the remarriage; he was competent to make such change, whether the divorce was valid or not; and it would be unreasonable to make the legitimacy of his children depend on his personal law at any date prior to that of the marriage from which

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they spring. But when the woman has been divorced and remarries, her power to change her domicile or political nationality in the interval depends on the validity of the divorce. Therefore if her personal law at the date of the divorce was that of a country which would not recognize it, she never acquired a capacity to remarry in accordance with her personal law; and pursuant to the doctrine that the capacity of each party to a marriage according to his personal law is requisite, which in § 21 has been expressed with regard to age and the prohibited degrees, it must be unavailing to allege that the divorce and the remarriage would be deemed valid in the *locus actus* of the latter and by the personal law of the second husband. Since the main scope of this work is to present the English authorities, it is not necessary here to discuss a case which does not appear to have arisen before our courts, namely that in which a sentence of judicial separation, pronounced in her undoubted country, may authorize a woman to transfer her domicile independently of her husband, and thereby to acquire a capacity for remarriage without any divorce which otherwise than by reason of such transfer would be held valid in her former country. The next § shows that on the point which has occurred the English authorities take the view just now expressed.

§ 53. Where the capacity of a woman to remarry depends on the validity of a divorce the jurisdiction for which is not deemed in England to have been internationally competent, the children of the remarriage will be deemed illegitimate in England, notwithstanding that the remarriage is deemed to be valid in its *locus actus* and by the personal law of the new husband.

Re Wilson, 1865, L. R., 1 Eq. 247, Kindersley; confirmed, *sub nom. Shaw* v. *Gould*, 1868, L. R., 3 E. & I. A. 55, Cranworth, Chelmsford, Westbury, Colonsay.

§ 54. With regard to the legitimation of a child by the subsequent marriage of its parents, neither the place of its birth nor that where the marriage is contracted is important. But such legitimation cannot take place unless permitted by the personal law of the father at the date of the marriage.

Since the legitimated child must acquire the personal law of its

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father, its legitimation in despite of the personal law of the father at the time of the legitimation would be a contradiction.

Dalhousie v. *McDouall*, 1840, 7 Cl. & F. 817 ; *Munro* v. *Munro*, 1840, 7 Cl. & F. 842 ; both decided together by Cottenham and Brougham. In these cases the father's domicile was held not to have been changed between the date of the birth and that of the marriage, but in stating the point before the house Brougham made no mention of the domicile of the father at the former date, but only at the latter: p. 882. Then he quoted the opinion of certain of the Scotch judges appealed from, that "the condition of children previously born . . . . . must be determined by the law of the country where the parents were domiciled at the birth and the marriage. If the domicile was not the same for both parents at these two periods, we should hold that that of the father at the time of the marriage should give the rule. But as they were the same in this case, the question does not arise." And with reference to the opinion thus quoted he added immediately, "thus agreeing clearly upon the point of law with the majority of the learned judges, though they differed in point of fact:" p. 884. Finally, he described himself as "agreeing with almost the whole of them," the Scotch judges, "upon the question of law:" p. 893. Lord Brougham therefore would have supported a wider statement than has been ventured on in the §, namely one that legitimation by subsequent marriage depends only on the law of the father's domicile at the date of the marriage ; but lord Cottenham contented himself with "the proposition that the child of a Scotchman, though born in England, becomes legitimate for all civil purposes in Scotland by the subsequent marriage of the parents in England, if the domicile of the father was and continued throughout to be Scotch:" p. 875. This is one of the Scotch appeals which, as stated on p. 43, I quote because nothing was intended by the house of lords to turn on the reception of any particular rule of private international law in Scotland.

§ 55. Neither however can the legitimation of a child by the subsequent marriage of its parents take place unless it is also permitted by the personal law of the father at the date of the birth.

This was decided by vicechancellor Wood, in *re Wright*, 1856, 2 K. & J. 595, not noticing the contrary opinion of Lord Brougham shown under the last § and erroneously quoting Lord Cottenham as saying in *Munro* v. *Munro* that "the question in such cases must be, can the legitimization of the children be effected in the country in which the father is domiciled at their birth?" p. 614. The doctrine however was repeated by the same judge, as lord Hatherley, in *Udny* v. *Udny*, 1869, L. R., 1 S. & D. A. 447, and followed in *Goodman* v. *Goodman*, 1862, 3 Giff. 643, Stuart ; and it has since been again asserted in *re Grove, Vaucher* v. *Solicitor to Treasury*, 40 Ch. D. 216, Cotton Fry and Lopes, 1888, affirming Stirling, 1887.

Savigny's opinion is the same as that of the Scotch judges in *Munro* v. *Munro* and of Lord Brougham. He says: "legitimation

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by subsequent marriage is regulated according to the father's domicile at the time of the marriage, and in this respect the time of the birth of the child is immaterial. It has indeed been asserted that this latter point of time must be regarded, because by his birth the child has already established a certain legal relation, which only obtains fuller effect by the subsequent marriage of the parents; and it is added that the father could arbitrarily elect before the marriage a domicile disadvantageous to the child. But we cannot speak at all of a right of such children or of a violation of it, since it depends on the free will of the father not only whether he marries the mother at all, but even, if he contracts such a marriage, whether he will recognize the child. In both these cases the child obtains no right of legitimacy, for a true proof of filiation out of wedlock is impossible, and accordingly voluntary recognition, along with marriage and independently of it, can alone confer on the child the rights of legitimacy." *

The following cases bear on the subject of legitimacy, but it is not possible to extract a rule from them. *Strathmore Peerage*, 1821, 6 Paton 645, Eldon and Redesdale; *Munro* v. *Saunders*, or *Rose* v. *Ross*, 1830, 6 Bligh N. R. 468, 4 Wils. & Sh. 289, Eldon, Lyndhurst, Wynford. In Bligh's report of *Rose* v. *Ross* the date is incorrectly given as 1832, and the respondent is incorrectly named *Rose* in the title.

§ 56. A child whose legitimacy has been acquired through the subsequent marriage of its father, domiciled abroad, ranks as a child under the British legacy and succession duty acts.

Skottowe v. *Young*, 1871, L. R., 11 Eq. 474, Stuart.

See the same principle applied to the statute of distributions and to the construction of wills of personalty in § 126, which might equally well have been placed here, but it was desirable to notice the point both here and in connection with personal successions.

§ 57. But if a child born in a country politically foreign be legitimated by the subsequent marriage of its parents, it will not thereby be naturalized under st. 4 Geo. 2, c. 21, although its father was a natural-born British subject; because the benefit of that act is expressly limited to children whose fathers were natural-born

* Syst. d. heut. Röm. rechts, § 380; Guthrie's translation, p. 250.

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subjects at the time of their birth, and at the time of its birth the child was not only an alien but *filius nullius*, and in legal understanding had no natural-born subject for its father.

Shedden v. *Patrick*, 1854, 1 Macq. 535 ; Cranworth, Brougham, St. Leonards.

§ 58. Where there has been no marriage at all between the parents, a foreign law entitling illegitimate children to succeed, as such, leaves them strangers in blood within the English Succession Duty Act.

Atkinson v. *Anderson*, 1882, 21 Ch. D. 100, Hall.

It must be observed, with regard to the doctrines on legitimation quoted in this section even from English authorities, that they do not determine the right of succeeding to real property in England. We shall see in due place that the right of inheriting English land is held to be limited by the condition of having been born in wedlock, in addition to that of being legitimate.

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CHAPTER V.

SUCCESSION TO MOVABLES ON DEATH.

After status, capacity, and family relations, the Italian code passes to the respective laws which govern movables and immovables in general. I prefer however to pass to the remaining cases in which property is considered in special connection with a person, in order to exhaust the applications of the personal law while on the subject of it; and of such applications the most important, after those connected with marriage, are those connected with death. These must for English practice be limited to movables, because English land is in no case subjected to the personal law, but always to the *lex situs*.

In England, and in those countries and colonies of which the law is derived from that of England, the personal or movable property of a deceased person can only be possessed under a grant from public authority, usually judicial. Such grant is, in England, in one or three forms:

(1.) Probate of a will, granted to the persons, one or more, appointed in such will as executors;

(2.) Administration with the will annexed, where no executor is appointed by the will;

(3.) Administration, where the deceased left no will.

The executors or administrators have to realize the personal property of the deceased, pay his debts, and distribute the surplus among those who may be entitled under the will, or by law in case of intestacy. These duties are classed together under the name of administration, which term has therefore two meanings: it is used in opposition to probate, to express a certain description of public

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grant, and it is used to express that course of dealing with the property granted which is expected from the grantee, whatever was the kind of grant.

In those countries of which the law has been derived from that of Rome more directly than has been the case with the English law on the subject, the movable property of a deceased person, like his immovable property, descends on the heirs appointed by his will or entitled by law as the case may be, and in some cases on his universal legatees, subject of course to the acceptance of such heirs or legatees. And these are liable personally for the debts of the deceased, though, if they have accepted the succession with benefit of inventory, only to the amount of the property received by them, to which amount they are also liable for the particular legacies bequeathed by the will; but the beneficial interest is theirs, subject to the satisfaction of the debts and particular legacies. The appointment of executors by a testator is exceptional, and the power of making it is usually limited, as for instance by Art. 1026 of the Code Napoleon, which permits seisin of movable property alone to be given to the executors, and of this for not more than a year and a day.

In the former, or English, system, only the beneficial interest in the surplus of personal property, remaining after payment of debts, is transmitted on death, whether in the case of testacy or of intestacy. The property itself passes by a public grant, made after the death, and implying no beneficial interest, though in the absence of an executor appointed by will it is usually made to some one beneficially interested. In the latter, or continental, system, the movable property is itself transmitted on death, whether in the case of testacy or of intestacy, and such transmission implies a beneficial interest, which is limited only by the debts and legacies to be satisfied out of it. This system, as will be perceived, is very similar to that which through successive legislative changes has come to exist in England for real property. The common origin of both systems is the ancient principle of Roman law, by which the heir continued, and in that sense represented, the person of the deceased, both as to his rights and as to his obligations. The principle has

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been modified in England, for personal property, first by making a public grant necessary in all cases for the representation of a deceased person, and secondly by separating the beneficial interest in the representation from the representation itself; and the executor or administrator, called in England the personal representative, has thus come to be something very different from the complete continuator of the deceased's person. In the continental system, the principle has been modified only by the benefit of inventory, introduced by Justinian.

In working out the problems which arise for private international law out of these systems, the continental rule governs movable succession, whether testate or intestate, by the personal law of the deceased, this being extended by the Italian code, in accordance with the opinion of Savigny,* even to the immovable property of the deceased situate in other countries than his own. The principle which lies at the base of the English authorities with regard to succession in personal property is in substance an adaptation of the same rule to the English system, and may be stated thus:

§ 59. The law of a deceased person's last domicile governs the beneficial interest in the surplus of his personal property, after payment of his debts, funeral expenses, and expenses of administration, that is of getting in and distributing such property; and this, whether in the case of testacy or in that of intestacy.

And since no law can be so well expounded or applied as by the courts of the country where it is in force, the following corollary from the last § is well established:

§ 60. Where the court of a deceased person's last domicile has had an opportunity of declaring who are entitled to the beneficial interest in his personal property, subject to payment of his debts, funeral expenses, and expenses of administration, its authority is regarded in England as final, whether the question arises on a claim to a grant of administration, on a claim to be heard as contradictor to a will propounded for probate, in the distribution of the English assets after payment of debts and the other expenses above mentioned, or in any other way.

* Syst. d. heut. Röm. rechts, § 376; Guthrie's translation, p. 227.

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Crispin v. *Doglioni*, 1863, 3 S. & T. 96, Cresswell; 1866, L. R., 1 E. & I. A. 301, Chelmsford and Cranworth.

§ 61. Where the law of the deceased's last domicile refers his movable succession to the law of his nationality, the doctrine of § 60 applies to the court of the country to which he belonged by nationality.

Re Trufort, Trafford v. *Blanc*, 1887, 36 Ch. D. 600, Stirling.

§ 62. By the law of the deceased's last domicile, in the preceding §§, must be understood that law as it existed at the date of his death. A retrospective law, passed since the death, will be disregarded by the English court in all questions concerning the succession.

Lynch v. *Provisional Government of Paraguay*, 1871, L. R., 2 P. & M. 268, Penzance.

The more detailed international questions which arise in England on the matter of personal succession may conveniently be taken in the order of the proceedings in a particular case. First will come the rules as to the person to whom a grant of probate or administration is made, and those as to what wills are provable: both these operate at the same time in determining the grant, but the former are of more general application, because they comprise the case of intestacy as well as that of testacy. Next will come the rules as to what property passes by the grant of probate or administration, and, last, those which decide the questions that can arise in the administration of such property, taking the word administration in the second of the two senses contrasted on p. 98.

The Grant of Probate or Administration.

§ 63. Whatever the domicile or political nationality of the deceased, his personal property situate in England cannot be lawfully possessed, or if recoverable in England cannot be sued for, without an English grant of probate or administration.

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Tourton v. *Flower*, 1735, 3 P. W. 369, Talbot. *Price* v. *Dewhurst*, 1838, 4 M. & C. 76, Cottenham; illustrating what is a necessary consequence of the §, that in the judicial administration of the personal estate of a deceased person, that is to say when the duty of the executors or administrators to administer is being carried out under the direction of a court—see the second sense of administration, p. 93—the court can take no notice of any will which has not been proved in England. *Exp. Fernandes' Executors*, 1870, L. R., 5 Ch. Ap. 314, Giffard, reversing Romilly.

In *Huthwaite* v. *Phayre*, 1840, 1 M. & Gr. 159, Tindal, Bosanquet, Coltman and Erskine allowed an administrator under an Irish grant to sue on a deed which was assumed to have been *bona notabilia* in Ireland at the date of the death. But this was certainly an error: see *Whyte* v. *Rose*, under the next §. In *Vanquelin* v. *Bouard*, 1863, 15 C. B., N. S. 341; second count and 16th plea; it was held by Erle, Williams, and Keating that a universal successor, entitled under the law of a deceased person's domicile to sue in his own right for debts comprised in the succession, could sue for them in England in his own name, without an English grant. At the same time they were anxious to save the rule laid down in this §, only they seemed to think that their own holding applied to a peculiar case, instead of the case before them being the general one under continental law.

If however the question does not relate to the personal estate of a deceased person as such, but to property which the persons acting under his will admit to be held by them in trust pursuant to it, *quære* whether the English court may not look at a foreign probate as it might look at any other document presented to it as containing the terms of the trust. *Re Tootal's trusts*, 1883, 23 Ch. D. 532, (pp. 541, 2), Chitty, may perhaps be sustained on this ground, independent of the ground noticed in *re Vallance*, 1883, 24 Ch. D. 177, Pearson.

§ 64. And no grant from any foreign jurisdiction is necessary, to enable a suit for any personal property of the deceased to be maintained in England.

Whyte v. *Rose*, 1842, 3 Q. B. 496; Tindal, Abinger, Coltman, Maule, Parke, Alderson, Rolfe; reversing the same case, 1840, ib. 493, Denman, Littledale, Patteson, Coleridge.

§ 65. The leading maxim for determining the person to whom the English grant should be made cannot be better expressed than by the following quotation. "I have before acted on the general principle that where the court of the country of the domicile of the deceased makes a grant to a party, who then comes to this court and satisfies it that by the proper authority of his own country he has been authorized to administer the estate of the deceased, I ought without further consideration to grant power to that person to ad-

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minister the English assets." *Lord Penzance*, in *re Hill*, 1870, L. R., 2 P. & M. 90.

The same judge is reported to have expressed the same maxim on another occasion as follows. "It is a general rule on which I have already acted that where a person dies domiciled in a foreign country, and the court of that country invests any body, no matter whom, with the right to administer the estate, this court ought to follow the grant simply, because it is the grant of a foreign court, without investigating the grounds on which it was made, and without reference to the principles on which grants are made in this country." *Re Smith*, 1868, 16 W. R. 1130, Wilde. But this mode of expressing the maxim is scarcely so accurate, for it will be seen that so long as power to administer is granted to the same person who has received it from the court of the domicile, it is not always necessary that he should receive it in the same form: below, § 69. In support of the present §, see also *re Rogerson*, 1840, 2 Cur. 656, Jenner.

A converse rule to that of § 65, requiring that, where the deceased was domiciled in England, power to administer should be granted in the colonies to the person who had received such power in England, was laid down by the Privy Council as early as 1762, in *Burn* v. *Cole*, Ambl. 415, Mansfield. In *Browne* v. *Phillips*, 1737, there cited, the Privy Council considered that the rule did not extend to the case where administration in the domicile had been granted to a creditor; and it may not be quite certain that lord Mansfield disapproved this limitation, though his own words in *Burn* v. *Cole* do not repeat it. He cited however with disapproval the reason given for the rule in *Williams* v. ———, 1747, P. C., Lee, "that the plantations, being within the diocese of London, are subordinate to the prerogative of Canterbury;" "the better and more substantial reason for such a determination," he said, "is the residency."

Where a foreign court had assigned certain property of the testator to one of his heirs, administration was granted to that heir, limited to the property so assigned: *Re Dost Aly Khan*, 1880, 6 P. D. 6, Hannen.

Administration with will annexed granted to attorneys for the use and benefit of one who by the executor in the domicile had been lawfully substituted as such for himself. *Re Black*, 1887, 13 P. D. 5, Butt.

§ 66. The rule of § 65 applies in favour of one who has received in the domicile a grant *de bonis non*, as well as to one who has received an original grant.

Re Hill, 1870, L. R., 2 P. & M. 89, Penzance.

§ 67. And it has been applied in favour of one who in the domicile had been appointed judicial administrator, pending a suit to determine which of two wills was valid.

Viesca v. *d'Aramburu*, 1839, 2 Cur. 277, Jenner.

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§ 68. Also in favour of one who in the domicile has been appointed provisional executor, during the incapacity of the executor named by the will; and the grant of administration was then limited to such time as the authority of the provisional executor should continue in the domicile.

Re Steigerwald, 1864, 10 Jur., N. S. 159, Wilde.

§ 69. Where in the testator's domicile probate has been granted to one as executor according to the tenour, the case being such that according to English practice he would only have been entitled to administration with the will annexed, the grant to the foreign executor will only be administration with the will annexed.

Re Read, 1828, 1 Hagg. Eccl. 474, Nicholl; *re Mackenzie*, 1856, Deane 17, Dodson; *re Cosnahan*, 1866, L. R., 1 P. & M. 183, Wilde; *re Earl*, 1867, L. R., 1 P. & M. 450, Wilde.

§ 70 "From and after the date aforesaid" [12th November, 1858] "it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England or in Ireland, or in both: provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by his interlocutor find, that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile: provided also that the value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom." Confirmation and probate act 1858; st. 21 & 22 Vict., c. 56; s. 9.

"From and after the date aforesaid, when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes besides the personal estate situated in Scotland also personal estate situated in England, shall be produced in the principal court of probate in

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England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said court of probate." Ib. s. 12.

This legislation provides, in fact, for a new form of English grant and proof, and therefore does not affect the necessity of an English grant for possession or suit in England, or the necessity of an English proof before a court of administration in England can take notice of a will, as laid down under § 63.

Sect. 13 of the same act is identical with s. 12, putting Ireland for England, and s. 14 makes a corresponding provision for giving efficacy in Scotland to probates and letters of administration granted in England or Ireland to the executors or administrators of persons who died domiciled in the latter countries respectively.

§ 71. Where the deceased died domiciled abroad, and no one has been authorized to administer his personal estate by any court of his domicile, either because such authorization was unnecessary by the law of that country or otherwise, the English court makes the grant:

First, to the executors, if any, appointed by the will or appearing from its tenour.

And where the will of a testator who died domiciled abroad contains a general appointment of executors, the English court ought to grant probate of it to the executors so appointed without enquiring whether the will operates on any personal property in England, just as it would do in the case of the will of an English testator.

Lord Chelmsford, in *Enohin* v. *Wylie*, 1862, 10 H. L. 1, p. 23. Lord Westbury, in the same case, p. 14, referred to the further circumstance that the will had been authenticated by the executors in the proper court of the domicile; but the proposition does not seem to need that qualification.

§ 72. But where a testator appoints by the same will different

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executors for his English and foreign property, it may reasonably be assumed that those appointed for the latter will not be entitled to any probate in England.

In *re Winter*, cited under § 78, Sir C. Cresswell said: "I find that when a testator has left general executors and a limited executor, the practice has been to grant probate to each of them according to the terms of his appointment. I do not quite see the principle upon which that practice has obtained." With deference, the practice seems sound, and it leads to the conclusion that no probate could be granted to an executor specially appointed for property not within the jurisdiction.

§ 73. And an executor appointed by the will, but whose executorship has expired by the law of the testator's last domicile, is not entitled to any grant in England.

Laneuville v. *Anderson*, 1860, 2 S. & T. 24, Cresswell.

§ 74. In the case of foreign wills not expressly appointing executors, the English practice, where one is named as heir, is to grant him probate as executor according to the tenour, but only to grant administration with the will annexed to a universal legatee.

Re Oliphant, 1860, 30 L. J., N. S., P. & M. 82, Cresswell.

§ 75. Reverting to § 71, if there is no will, or no executors are appointed by the will or appear from its tenour, the second class of persons entitled to the grant, which under these circumstances must be one of administration and not of probate, is composed of those who as heirs, next of kin, or legatees, are interested in the beneficial succession, that is to say in the surplus after payment of debts and funeral and administration expenses. The English practice will be followed in selecting the grantees, subject to referring the question of beneficial interest to the law of the deceased's last domicile.

Re Stewart, 1838, 1 Cur. 904, Nicholl. And see *re Oliphant*, under the preceding §.

§ 76. And one who in the last domicile of the deceased represents the persons interested in the beneficial succession, for example as

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guardian of the deceased's children, is entitled to a grant of administration in England.

Re Bianchi, 1862, 3 S. & T. 16, Cresswell.

§ 77. Thirdly, failing any title to the grant under the preceding §§, it will be made to a creditor.

Re Maraver, 1828, 1 Hagg. Eccl. 498, Nicholl.

§ 78. Whether a testator died domiciled in England or abroad, administration will not be granted with a will or codicil relating only to foreign property annexed, nor will probate be granted of any such will or codicil unless it be incorporated by reference in some will otherwise entitled to probate in England, in which case it is necessary for the justification of the English executors that the document referred to should be included in the probate, in order that it may be seen that they have no concern with the property disposed of by it.

Re Coode, 1867, L. R., 1 P. & M. 449, Wilde; overruling *Spratt* v. *Harris*, 1833, 4 Hagg. Eccl. 405, Nicholl, and *re Winter*, 1861, 30 L. J., N. S., P. & M. 56, Cresswell. *Re Harris*, 1870, L. R., 2 P. & M. 83, Penzance; *re De La Saussaye*, 1873, L. R., 3 P. & M. 42, Hannen; *re Howden*, 1874, 43 L. J., N. S., P. & M. 26, Hannen; in all which cases the documents disposing of the foreign property were admitted to probate on the ground of incorporation, and in the last of them the reason given in the § was assigned by the judge.

§ 79. By st. 24 & 25 Vict., c. 121, s. 4, it is enacted that subject to reciprocity being secured by a convention with the foreign state in question, and to the making of an order in council thereupon, "whenever any subject of such foreign state shall die within the dominions of her majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul viceconsul or consular agent of such foreign state within that part of her majesty's dominions where such foreign subject shall die to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons

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entitled thereto; but such consul viceconsul or consular agent shall immediately apply for and shall be entitled to obtain from the proper court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such court shall seem fit."

Validity of Wills of Personal Estate.

§ 80. As to the testamentary character of a document, and its validity as a will or codicil, with respect not only to the forms of execution but also to every circumstance on which the validity of a will may depend, the English Court will follow a judgment obtained in the country in which the testator or alleged testator had his last domicile.

Probate, or administration with document annexed, granted on the strength of a judgment in the domicile. *Hare* v. *Nasmyth*, 1816, 2 Add. 25, Nicholl; *Re Cosnahan*, 1866, L. R., 1 P. & M. 183, Wilde; *Miller* v. *James*, 1872, L. R., 3 P. & M. 4, Hannen. In the last case unsound mind and undue influence were objected, but the court held itself bound by the judgment in the domicile in favour of the will, although those objections had not been made there.

Probate, or administration with document annexed, refused or revoked on the strength of a judgment in the domicile. *Hare* v. *Nasmyth*, 1821, 2 Add. 25, Nicholl, probate revoked; *Moore* v. *Darell*, 1832, 4 Hagg. Eccl. 346, Nicholl; *Laneuville* v. *Anderson*, 1860, 2 S. & T. 24, Cresswell.

§ 81. Yet it is said that where a court of the domicile has pronounced on a document propounded as testamentary, the authority which is allowed to that judgment in accordance with the preceding § rests only on its being conclusive evidence of the law of the domicile, and that it is therefore not sufficient to aver the judgment, but those who propound the document must aver its execution according to the law of the domicile.

Isherwood v. *Cheetham*, 1862, 7 L. T., N. S., 250, Cresswell.

§ 82. On the other hand, where the original document is in English, and a translation of it has been established in the court of the domicile, if the doctrine of § 80 be relied on, what will be obtained will be administration with a retranslation of the translation annexed,

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although the original will be admitted to probate on proof of its validity according to the law of the domicile.

Re De Vigny, 1865, 4 S. & T. 13, Wilde; *Re Clarke*, 1867, 36 L. J., N. S., P. & M. 72, Wilde; *re Rule*, 1878, 4 P. D. 76, Hannen. It seems difficult to reconcile this with § 81, for if the foreign judgment operates only as evidence of due execution according to the law of the domicile, it is the original the due execution of which is so testified by it, and therefore it might be argued that probate of the original, or administration with a copy of the original annexed, ought to be granted in England, even on the strength of the foreign judgment.

§ 83. If the testamentary character of a document, or its validity as a will, is being litigated in the testator's last domicile, probate in England will be suspended in order to await the result of those proceedings.

Hare v. *Nasmyth*, 1815, 2 Add. 25, Nicholl; *De Bonneval* v. *De Bonneval*, 1838, 1 Cur. 856, Jenner.

§ 84. The English court will also follow the court of the domicile, on the question whether two papers are to be admitted to probate as a will and codicil, or as containing together the will of the deceased.

Larpent v. *Sindry*, 1828, 1 Hagg. Eccl. 382, Nicholl.

§ 85. When the English court is not aided by any judgment in the testator's last domicile, the old rule was that the testamentary character and validity of any document propounded must be tried by the law of that domicile. But now, by section 3 of st. 24 & 25 Vict. c. 114, commonly called lord Kingsdown's act, "no will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same." And by section 5, "this act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this act," 6th August 1861. Consequently, in the case of future testators, or of those who have died since the date just named, the document will be held a valid testamentary one if it satisfies either the law of the testator's last domicile, or that of the place which was his domicile at the date of the document; and it is

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necessary that it should satisfy one of those two laws, so far as the case does not fall within the exceptions stated in §§ 87, 88.

For the old rule, see *Stanley* v. *Bernes*, 1831, 3 Hagg. Eccl. 447, Court of Delegates, Parke, afterwards lord Wensleydale, apparently being their president; reversing the same case, 1830, 3 Hagg. Eccl. 373, Nicholl, who had admitted to probate codicils not executed according to the law of the domicile, on mixed considerations, referring to the testator's political nationality, to the situation of the property bequeathed (money in the British funds), and to a supposed difference between the respect to be paid to the law of the domicile in cases of testacy and of intestacy. Sir John Nicholl had expressed similar views in *Curling* v. *Thornton*, 1823, 2 Add. 6. See also *de Zichy Ferraris* v. *Hertford*, 1843, 3 Cur. 468, Jenner Fust; affirmed 1844, *sub nom. Croker* v. *Hertford*, 3 Mo. P. C. 339, Lushington; in which the place of execution and the situation of the property disposed of were repudiated as grounds of decision on the form of a will: and *Page* v. *Donovan*, 1857, Deane 278, Dodson, where the *lex loci actus* was not even referred to.

In *re Prince P. G. Oldenburg*, 1884, 9 P. D. 234, Butt, it was determined by the special law of an imperial family what document should be admitted to probate as the will of a member of that family.

§ 86. Either the old or the new rule in § 85 is not limited to the forms of execution, but extends to every circumstance on which the validity of a will may depend, except, it is presumed, the testator's capacity, which even under the new rule should certainly continue to be determined by his personal law at the time of his death. Thus, under the new rule, if the testator marries after changing his domicile, and his marriage would revoke his will by the law of his last domicile, but not by that under which he was domiciled at the time when he made his will, the will is not revoked.

Re Reid, 1866, L. R., 1 P. & M. 74, Wilde.

§ 87. "Every will and other testamentary instrument made within the United Kingdom by any British subject, whatever may be the domicile of such person at the time of making the same or at the time of his or her death, shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made." St. 24 & 25 Vict. c. 114, s. 2. This enactment, in the cases to which

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it applies, adds a third alternative, that of the *locus actus*, to those of the new rule in § 85, with regard to the forms of execution, but not with regard to any other circumstance on which the validity of a will may depend. For the commencement of its operation see s. 5, quoted in § 85.

§ 88. "Every will and other testamentary instrument made out of the United Kingdom by a British subject, whatever may be the domicile of such person at the time of making the same or at the time of his or her death, shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her majesty's dominions where he had his domicile of origin." St. 24 & 25 Vict. c. 114, s. 1. This enactment, in the cases to which it applies, adds two alternatives, that of the *lex loci actus* and that of the law existing in the domicile of origin at the date of the will, to those of the new rule in § 85, with regard to the forms of execution, but not with regard to any other circumstance on which the validity of a will may depend. For the commencement of its operation see s. 5, quoted in § 85.

The enactments in §§ 87 and 88 were applied to the wills of naturalized British subjects in *re Gally*, 1876, 1 P. D. 438, Hannen (case of § 87), and *re Lacroix*, 1877, 2 P. D. 94, Hannen (case of § 88). The former case however might have been decided on the new rule in § 85, and the latter on the same rule combined with that in § 89. The same enactments were not extended to the wills of aliens by the naturalization act, 1870, s. 2: *Bloxam* v. *Favre*, 1883, 8 P. D. 101, Hannen; affirmed 1884, 9 P. D. 130, Selborne, Coleridge, Cotton. Nor do they apply to the wills of persons who have lost the British nationality which they had by birth: *re von Buseck*, 1881, 6 P. D. 211, Hannen.

§ 89. In interpreting §§ 85, 87 and 88, the law of any foreign country by which a will may be sustained includes private international law as received in that country, so that if a will would there be held valid because executed according to the forms of any other law, as for example that of the *locus actus* or of the testator's political nationality, an execution according to those forms will be one

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according to the law of the domicile, though not in accordance with the forms of the domicile.

Collier v. *Rivas*, 1841, 2 Cur. 855, Jenner (the doubt expressed as to the facts of this case in *Bremer* v. *Freeman*, 1857, 10 Mo. P. C. 374, does not affect the law in it); *Crookenden* v. *Fuller*, 1859, 1 S. & T. 441, Cresswell; *Laneuville* v. *Anderson*, 1860, 2 S. & T. 24, Cresswell, pp. 38, 39; *re Lacroix*, 1877, 2 P. D. 94, Hannen. In the first three cases this interpretation was treated as applicable to the old rule in § 85, and in the last to § 88.

§ 90. In all the cases where alternatives are given by §§ 85, 87 or 88, the court will have regard to the law of one country only at a time, and will not mix up the legal precepts of two countries.

Pechell v. *Hilderley*, 1869, L. R., 1 P. & M. 673, Penzance.

§ 91. Where a document was intended to operate in execution of a power to appoint by will, conferred on its author by some instrument itself operating under English law, it must be admitted to probate, or administration must be granted with the document annexed, in either of two cases, notwithstanding in each case that the author may have had no testamentary capacity otherwise than as donee of the power. And the grant of probate or of administration with the document annexed will be decisive in favour of its being a good execution of the power, so far as the question of form is concerned.

The first case is that where the document complies with the forms which would be required for its validity as a will by the law, or any of the laws, which under the preceding §§ would be applicable in the case of an ordinary testator.

Barnes v. *Vincent*, 1846, 5 Mo. P. C. 201; Brougham, Buccleugh, Cottenham, Campbell, Knight-Bruce. The concurrence of the privy councillors who heard the argument, and of Lyndhurst and Sugden, to whom the judgment had been submitted, is stated by Brougham at p. 218. No question of private international law arose in this case, but it was decided that the will of an English married woman, which satisfied English testamentary forms, should be admitted to probate without enquiring whether it also satisfied the particular formalities imposed by the power in execution of which it was made; and the date of the will prevented the decision being aided by the wills act, which now, as a rule of English law, puts the general English testamentary forms in the place of all particular formalities imposed by powers on their execution by will. The principle of the decision was that probate must not be refused on the ground of the form of the document, in any case in which such form would entitle it to

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probate if its author were an ordinary testator; and the bearing of the principle on private international law was not allowed by lord Brougham to pass unnoticed. See p. 217. The international application arose in *D'Huart* v. *Harkness*, 1865, 34 Beav. 324, Romilly, where the will of a married woman, made since the wills act under an English power, was not in English form, but was in good form by the law of her last domicile. It had been proved, apparently without objection, and was held to be a good execution of the power. But lord Cranworth stated the inclination of his opinion to be opposed to this doctrine, in *Dolphin* v. *Robins*, 1859, 7 H. L. 419; where however *Barnes* v. *Vincent* does not seem to have been quoted. On the other hand the dissents from § 92, which will be noticed under that §, are so many more authorities in support of the doctrine now under consideration.

§ 92. The second case is that where the document complies with English testamentary forms, although it does not comply with any forms which under the preceding §§ would sustain its validity as the will of an ordinary testator.

Tatnall v. *Hankey*, 1838, 2 Mo. P. C. 342, Brougham. The report of this case was corrected, and the case followed, in *re Alexander*, 1860, 29 L. J., N. S., P. & M. 93, and 1 S. & T. 454, note, Cresswell; contrary to the personal opinion of that learned judge, which he had previously expressed in *Crookenden* v. *Fuller*, 1859, 1 S. & T. 441. *Tatnall* v. *Hankey* was again followed, and also with dissent, in *re Hallyburton*, 1866, L. R., 1 P. & M. 90, Wilde.

§ 93. Where the document does not come within either of the above cases, it is not a good execution of the power.

Re Daly, 1858, 25 Beav. 456, Romilly.

§ 94. That the document comes within either of the said cases must be established by its being proved in England.

Re Vallance, 1883, 24 Ch. D. 177, Pearson; explaining or correcting *re Tootal's Trusts*, 1883, 23 Ch. D. 532, Chitty.

It will be understood that nothing in this section applies to the validity of wills of English real estate.

What Personal Estate passes by the Grant of Probate or Administration, or must be accounted for by the English Executor or Administrator.

In England and those other countries in which the succession to

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movable property on death is regulated by the method of English law explained on p. 93, every grant of probate or administration is held to carry such corporeal chattels of the deceased as either are at the date of the grant within the jurisdiction of the court from which it issues, or afterwards come within that jurisdiction without having been previously reduced into possession by lawful authority since the death. Such authority would be that of an administrator under a grant issued by some other court, or that of an heir or universal legatee entitled without grant under the continental system explained on p. 94. The property in all goods falling within this description is vacant, and the jurisdiction in which they are found can confer it on the executor whom it confirms or the administrator whom it appoints. But if the goods only come into the jurisdiction after they have been reduced into possession by lawful authority since the death, the property in them has not been vacant at any moment at which the domestic grant could operate on them; they must be recognized as being the goods of the foreign heir or legatee, executor or administrator. Let us say, of the foreign heir or administrator, taking the latter term, as is very commonly done, in an extended sense, so as to include executors. If the goods, since the decease of the testator or intestate, have been within a foreign jurisdiction in which a grant has been made, or an heir entitled to their possession exists, but the administrator under that grant or the heir has not reduced them into possession, that makes no difference: the property is regarded as vacant when they enter the domestic jurisdiction. Thus in a New York case, where there were stage-coaches and stage-horses belonging to a daily line running from one state to another, chancellor Walworth said: "if administration had been granted to different individuals in the two states, I think the property must have been considered as belonging to that administrator who first reduced it into possession within the limits of his own state." *Orcutt* v. *Orms*, 1832, 3 Paige 459, 465. And Story says: "according to the common course of commercial business, ships and cargoes and the proceeds thereof, locally situate in a foreign country at the time of the death of the owner, always proceed on their voyages and return to the home port without any suspicion that all the parties concerned

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are not legally entitled so to act; and they are taken possession of and administered by the administrator of the *forum domicilii*, with the constant persuasion that he may not only rightfully do so, but that he is bound to administer them as part of the funds appropriately in his hands." *Conflict of Laws*, § 520. Hence:

§ 95. The corporeal chattels of a deceased person belong to the heir or administrator who first reduces them into possession within the territory from the law or jurisdiction of which he derives his title or his grant.

"If property came to England after the death, would the foreign administration give a right to it?" Rolfe, in *Whyte* v. *Rose*, 1841, 3 Q. B. 506. "Suppose, after a man's death, his watch be brought to England by a third party, could such party, in answer to an action of trover by an English administrator, plead that the watch was in Ireland at the time of the death?" Parke, ib. These questions were evidently meant to be answered in the negative, and to refer to property not reduced into possession before it is brought to England. "It seems to me that your argument goes too far, and would show that no administration in England could give a right over goods anywhere out of England. A man may sue here in his own name, naming himself as executor or administrator under a foreign probate or grant; but does a man ever sue here in the character of executor or administrator under such a probate or grant?" Abinger, ib. p. 504. Here lord Abinger appears to have contemplated property which had been reduced into possession under a grant within the jurisdiction from which the grant issued. If England was that jurisdiction, the English administrator would afterwards have a right over the goods out of England: if that jurisdiction was foreign, the goods would afterwards belong in England to the foreign administrator, who might sue for them in his own right, naming himself administrator under a foreign grant as a mere matter of description. *Currie* v. *Bircham*, 1822, 1 Dow. & Ry. 35, King's Bench; where it was held that an English administrator cannot recover from the agent in England of a Bombay administrator the proceeds, remitted to him by the latter, of effects of the intestate reduced into possession under the Bombay administration. It does not appear, and can have made no difference, whether the effects were corporeal chattels or choses in action.

With regard to the debts of the deceased, the jurisdiction in which it is necessary or possible to sue for them depends on considerations not connected with administration: the death of the creditor cannot affect that question, except so far as he may have been entitled, and his heir or administrator may not be entitled, to the benefit of some such exceptional legislation as that of Art. 14 of the Code Napoleon, which allows a Frenchman to sue in France on all obligations con-

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tracted towards him by foreigners. But in whatever jurisdiction the circumstances of the case point out that a debt ought to be or may be sued for, the administrator who has obtained a grant in that jurisdiction, or the heir who is entitled under its law, and he only, can sue for it therein, or, if the debt is assignable, assign the right of suing for it therein: see § 63. To this however the debts due on negotiable instruments are an exception, because they can be sufficiently reduced into possession by means of the paper which represents them. They are in fact in the nature of corporeal chattels. Hence:

§ 96. The negotiable instruments of a deceased person, and his bonds or certificates payable to bearer, belong to the heir or administrator who first obtains possession of them within the territory from the law or jurisdiction of which he derives his title or his grant. He can indorse them if they were payable to the deceased's order, and he or his indorsee can sue on them in any other jurisdiction without any other grant.

Att.-Gen. v. *Bouwens*, 1838, 4 M. & W. 171, Abinger, Parke, and (?). The point decided in this case was that such instruments, when found in England at the date of the death, are liable to probate duty; and the class to which the decision referred was described by lord Abinger, in delivering the judgment of the court, as that of instruments "of a chattel nature, capable of being transferred by acts done here, and sold for money here." That an administrator who becomes lawfully possessed in one state of a negotiable note of the deceased need not take out administration in the state where the debtor resides, in order to sue on it, is laid down by Story: Conflict of Laws, § 517. The point established by the decision in *Whyte* v. *Rose*, during the argument of which the observations cited under § 95 were made, was that the place where an instrument which is not negotiable is found at the death is of no importance to the question under what grant it ought to be sued on: 1842; Tindal, Abinger, Coltman, Maule, Parke, Alderson, Rolfe; reversing Denman, Littledale, Patteson and Coleridge, whose judgment was given in 1840.

§ 97. Judgment is another means of reducing debts into possession. Therefore when a foreign heir or administrator has obtained judgment abroad on a debt due to the deceased, he may sue in England on such judgment, or prove on it in bankruptcy or any other administration of assets (*concursus*), without an English grant.

Vanquelin v. *Bouard*, 1863, 15 C. B., N. S. 341; first count; Erle, Williams, Keating: *re Macnichol*, 1874, L. R. 19 Eq. 81, Malins.

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§ 98. If an administrator receives without suit payment of a debt due to the deceased, will his receipt be a sufficient discharge to the debtor, supposing that the jurisdiction from which he holds his grant was not one in which the debt could have been recovered, and another administrator afterwards sues for the debt in the proper court for its recovery? On principle, it should not be a sufficient discharge.

In *Daniel* v. *Luker*, 1571, Dyer 305, Dalison 76, it was held that a release by one administrator was no answer to a suit in another jurisdiction, to the administrator in which the debt was thought more properly to belong; but the question between the two administrators was thought to depend on the locality of the deed at the time of the death, a notion exploded by *Whyte* v. *Rose*, quoted under § 96. In *Shaw* v. *Staughton*, 1670, 3 Keble 163, it seems to have been thought that the question whether even a recovery by one administrator was an answer to an action by another depended on the determination to which of the two the debt more properly belonged.

Besides the property which under the doctrine thus far developed passes primarily by an English grant, the wide extent which is given in this country to the liability of an administrator and to judicial administration of the effects of a deceased person may lead to the result that property is ultimately deemed to be comprised in such a grant, although it has been reduced into possession since the death under a foreign title or at least without any assistance from the English title.

§ 99. If a foreign administrator sends or brings to England any personal assets of the deceased, for his administration of which he has not yet accounted in the jurisdiction from which he derives his title, and which he has not caused by any specific appropriation to lose their character as part of the deceased's estate, a creditor or beneficiary may maintain an action here for their judicial administration, and an injunction and receiver will be granted in case of need to prevent their being removed out of the jurisdiction. But in accordance with § 63 an English administrator must be constituted and made a party to the action, the assets administered in which will be deemed to have passed by the grant to him.

Lowe v. *Fairlie*, 1817, 2 Mad. 101, Plumer: *Logan* v. *Fairlie*, 1825, 2 S. & St. 284, Leach: *Sandilands* v. *Innes*, 1829, 3 Sim. 263, Shadwell: *Bond* v. *Graham*,

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1842, 1 Hare, 482, Wigram: *Hervey* v. *Fitzpatrick*, first motion, 1854, Kay 421, Wood; receiver granted.

In *Anderson* v. *Caunter*, 1833, 2 My. & K. 763, which was a suit by a creditor against the Indian executrix of the debtor's Indian executor, who it was charged had possessed assets of the debtor, Leach held that the presence of an English administrator of that executor was unnecessary, saying that his estate could not be administered in the suit. But in *Tyler* v. *Bell*, 1837, 2 My. & Cr. 89, 110, lord Cottenham pointed out that this was irreconcilable with what the same judge had said in *Logan* v. *Fairlie*.

In *Arthur* v. *Hughes*, 1841, 4 Beav. 506, Langdale, there had been such a specific appropriation as to take the case out of this §. The principle was thus stated by Wigram in *Bond* v. *Graham*: "If an executor or administrator has so dealt with the fund that by reason of such dealing it has ceased to bear the character of a legacy or share of a residue, and has assumed the character of a trust fund in a sense different from that in which the executor or administrator held it—if it has been taken out of the estate of the testator and appropriated to or made the property of the cestui que trust—it may not be necessary that the cestui que trust should bring before the court the personal representative of the testator in a suit to recover that part of the estate."

§ 100. So also any personal liability for a breach of trust in dealing with any assets of the deceased, which under the ordinary rules governing the competence of the English court may be enforceable against a foreign administrator in this country, may be enforced by or in the presence of an English administrator of the deceased, the fruits of such action being in fact an asset of the deceased recoverable here.

Anderson v. *Caunter*, which as to this point is not impugned by *Tyler* v. *Bell*: see these cases referred to under the preceding §. *Twyford* v. *Trail*, 1834, 7 Sim. 92, Shadwell; decree against estates of Hall and J. A. Simpson. The last case also shows that the English executor of a foreign executor is not executor of the original testator, as the English executor of an English executor is.

§ 101. But the mere presence in England of a foreign administrator who is accountable in the jurisdiction from which he derives his title for assets received by him, but who has not so dealt with those assets as to make himself personally liable for a breach of trust, will not enable any one to maintain an action against him for judicial administration here, although for that purpose the plaintiff has procured an English grant.

Jauncy v. *Sealey*, 1686, 1 Vern. 397, Jeffreys: *Hervey* v. *Fitzpatrick*, second motion, 1854, Kay 434, Wood.

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§ 102. And although a foreign heir who has accepted the succession without benefit of inventory may probably be sued in England on the personal obligation he has thereby assumed towards the creditors of the deceased, and, if so, an English grant of administration is not necessary for that purpose, yet no action can be brought against him here for judicial administration, because his liability is not in respect of assets.

Beavan v. *Hastings*, 1856, 2 K. & J. 724, Wood.

§ 103. If an English administrator, without obtaining a foreign grant of administration, succeeds in reducing assets of the deceased into possession abroad, he will be liable to account for them in a judicial administration in this country, or on an issue upon assets in answer to the action of a creditor independent of judicial administration, just as if they had been received by authority of the English grant.

Dowdale's case, 1604, 6 Coke 46 *b*; *sub. nom. Richardson* v. *Dowdele*, Cro. Ja. 55; Common Pleas, on an issue upon assets, Walmsley dissenting. *Atkins* v. *Smith*, 1740, 2 Atk. 63, Hardwicke; where it would seem from the obscure note that the doctrine was applied to a case of judicial administration. Story understands that the English executor who in *Dowdale's case* was made liable for assets received by him in Ireland had received them under an Irish grant of administration, and accordingly treats that decision as irreconcilable with the modern ones: Conflict of Laws, § 514 *a*. If such were the fact, the decision would not be reconcilable with the doctrine of § 101, since it can scarcely be held that any difference ought to be made in the position of a person under a foreign grant by the circumstance of his holding an English grant as well: but I do not find the Irish grant mentioned in either of the reports of *Dowdale's case*. Story considers that an administrator who obtains assets of the deceased in a country where he has no grant will be liable in that country as executor *de son tort*; Conflict of Laws, § 514. This may well be true, and yet he may be also liable in the country from which he derives his grant.

In *Stirling-Maxwell* v. *Cartwright*, 1879, 11 Ch. D. 522; James, Baggallay, Bramwell; the court of appeal affirmed the decision of Hall (1878, 9 Ch. D. 173) who had held that if an English probate or letters of administration are not expressly limited to the English assets, no such limitation will be introduced into a judgment for administration founded on them although the deceased was domiciled abroad, unless there has been a decree for judicial administration abroad, as to which case the judge reserved his opinion. James said: "If anything had been done in Scotland, the court would have recognized the right of the Scotch court to deal with the matter. It is not for us to anticipate that there will be any such proceedings in Scotland." In *Orr Ewing*

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v. *Orr Ewing*, 1882, 22 Ch. D. 456, Jessel, Cotton and Bowen, reversing Manisty; reversal affirmed 1883, *sub. nom. Ewing* v. *Orr Ewing*, 9 App. Ca. 34, Selborne, Blackburn and Watson; it was held that where an order for service in Scotland has been made on one who is executor both in England and in Scotland, no proceedings being then pending in Scotland, and he appears unconditionally, the only judgment that can be pronounced at the trial is the common one for administration of the whole estate. The same matter gave rise to the Scotch appeal, *Ewing* v. *Orr Ewing*, 1885, 10 Ap. Ca. 453, Selborne, Blackburn, Watson, Fitzgerald. In *Sandilands* v. *Innes*, 1829, 3 Sim. 263 (see above, under § 99), Shadwell said that the account of the assets brought to England would incidentally make it necessary to take an account of all the assets possessed under the foreign administration. These authorities can hardly be considered as establishing either that there is no distinction between the case of an English administrator who has received foreign assets under a foreign grant and that of one who has received such assets without a foreign grant, or that the liability of a foreign administrator to account in England for the assets received under his foreign grant can depend on whether he has or has not an English grant also.

Principal and Ancillary Administrations, and Questions arising in Administration prior to the Distribution of the Surplus.

When the estate of a deceased person includes both personalty in England and property elsewhere, so that there are or may be concurrent administrations in different countries, that in the country of the deceased's domicile is called the principal administration and the others are called ancillary. It has been seen at p. 93 that an English administration consists of two parts, first, realizing the personal estate of the deceased and paying his debts, and secondly, distributing the surplus among those who are entitled by will, or by law in case of intestacy. The first part belongs to an ancillary administration as well as to a principal one, for the English courts, maintaining the paramount authority of the *situs* over the assets themselves as distinct from the beneficial interest in their clear surplus, a principle which we have already seen carried out in the necessity for an English grant in order to the possession of the English assets, consistently make it their rule to allow creditors to seek their remedy in England against the English assets, notwithstanding that the administration in this country is ancillary. That rule may be made the subject of the next §.

§ 104. An English grant of probate or administration renders the

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executor or administrator liable to account in an English court, to creditors of the deceased, for the assets received under it; so that even if the deceased was domiciled abroad, such executor or administrator cannot be required to hand over, and cannot safely hand over, any part of those assets to the heir or administrator of the domicile, until they have been cleared of debt.

Preston v. *Melville*, 1841, 8 Cl. & F. 1, Cottenham.

But it is much less clear how far the second part of the duty of administration, the distribution of the surplus, is held to be incumbent on an English personal representative when the deceased died domiciled abroad. Since the law of the domicile, and the authority of the court of the domicile where it has been consulted, are admitted to govern the rights in the surplus (§§ 60, 61), much may be said for the expediency of requiring that all questions relating to such rights shall be brought before the court of the domicile. Even in the case of intestacy, the law of succession must be best known to the courts of the country where it is in force; still more where a will is concerned, than which no class of documents is more fertile in legal disputes, ought the courts of that country to be appealed to by the law of which it must be interpreted and the validity of its dispositions ascertained.

§ 105. Where no action for administration is pending in England, and there is in the deceased's domicile either a personal representative in the English sense, charged with the distribution of the property, or an heir or universal legatee holding the property for his own benefit subject to actions by particular legatees, an English executor or administrator who pays over to such person the surplus of the English assets after clearing the estate will be held in England to be discharged by such payment.

In *Pipon* v. *Pipon*, 1744, Ambl. 25, lord Hardwicke refused to entertain a suit by persons claiming as next of kin the clear English assets of an intestate domiciled in Jersey, not merely because the general administrator was not before the court, but also saying "the plaintiffs are wrong in coming into this court for an account of only part, for by the statute [of distributions] an account must be decreed of the whole;" and "if I was to direct an account of the whole, the courts in Jersey would act contrary, which would be to involve people in great

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difficulties." It is true the reporter makes lord Hardwicke add, "this case differs from where a specific part consists of chattels here in England;" but that dictum is not reconcilable with the rest of the judgment, and I suspect the real words were "this case differs from a specific legacy of chattels here in England." In *Enohin* v. *Wylie*, 1862, 10 H. L. 1, it was laid down by lord Westbury that where the domicile of the deceased was foreign, not only the English executors or administrators, but even the English court, supposing the estate here to be under judicial administration, ought to hand over the surplus of the English assets to the persons who are entrusted with the administration of the estate in the domicile, in order to be distributed by them among the persons entitled by the deceased's will or by law. Lords Cranworth and Chelmsford thought otherwise, and the point did not call for decision. The doctrine stated in the § is covered by the principles laid down by Fry and Jessel in *Eames* v. *Hacon*, 1880, 16 Ch. D. 407, Fry; affirmed 1881, 18 Ch. D. 347, Jessel, Baggallay and Lush; but the decision in that case rested on other grounds as well.

§ 106. But where there is an action for administration in England, it is doubtful whether the court will insist on carrying that action out to its full completion, by distributing the surplus with such light as it can obtain on the law of the deceased's foreign domicile, or will hand over the surplus to a representative of the deceased in the domicile.

In *Weatherby* v. *St. Giorgio*, 1843, 2 Ha. 624, Wigram considered that as soon as the debts are paid the executor in the domicile is a mere trustee of the surplus for the parties beneficially interested, and that therefore to hand over the surplus to him would be contrary to the rule "that if property is given to a trustee for certain cestui que trusts, the court will pay it to the cestui que trusts and not to the trustee;" and this was in a case where the testator had expressly directed his English executors to transmit the surplus to his Italian executors. In *Meiklan* v. *Campbell*, 1857, 24 Beav. 100, the evident leaning of Romilly was towards distributing the surplus himself, only adopting any proceedings in the courts of the domicile. On the same side are the opinions of lords Cranworth and Chelmsford, cited under the preceding §. On the other side is the opinion of lord Westbury there cited, and the argument to be drawn from the action of the English court where the domicile is English, for which see the next §. In *Innes* v. *Mitchell*, 1857, 4 Dr. 141, 1 De. G. & J. 423, the beneficial interest in the English personal estate of a testatrix domiciled in Scotland was in dispute, and there was a suit pending in Scotland in which the question might have been tried. Kindersley and Knight-Bruce agreed in ordering service of the bill on certain defendants in Scotland, in order that the litigation in England might proceed; but Turner doubted.

§ 107. On the other hand, if the deceased was domiciled in England where there is an action for administration, and the English executors or administrators do not suggest that in respect of assets

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received by them under foreign title or authority the English court can give them no valid discharge as against creditors, an injunction will be granted in England to restrain the prosecution of a suit abroad for the administration of the personal estate there situate.

Hope v. *Carnegie*, 1866, L. R., 1 Ch. Ap. 320, Knight-Bruce and Turner, affirming Stuart. The discussion was between beneficiaries only. *Baillie* v *Baillie*, 1867, L. R., 5 Eq. 175, Malins. The plaintiff in the foreign proceedings claimed to be interested in the surplus, and although it was admitted that an account was necessary before it could be known whether there was a surplus, still the executors did not suggest that a foreign discharge as against creditors was necessary for their protection, and one of them on the contrary was the party who sought the injunction.

Of course the § assumes that the person against whom the injunction is sought is subject to the English jurisdiction. "The first question is whether there is any rule or principle of the court of chancery which, after a decree for administering a testator's assets, would induce it to interfere with a foreign creditor resident abroad, suing for his debt in the courts of his own country. Certainly not. Over such a creditor the courts here can exercise no jurisdiction whatever. . . . It must be observed that we are dealing with the case of a foreigner, or rather a foreign corporation, seeking no assistance from the courts of this country. If the appellants had come in under the decree, so as to obtain payment partially from the English assets, a very different question would arise." Lord Cranworth in *Carron Iron Company* v. *Maclaren*, 1855, 5 H. L. 441, 2. Brougham's view was similar, and St. Leonard's only differed as to whether the corporation in question was foreign. This was followed in *re Boyse*, *Crofton* v. *Crofton*, 1880, 15 Ch. D. 591, Malins. In *Graham* v. *Maxwell*, 1849, 1 Mac. & Gor. 71, Cottenham affirming Shadwell, the point of the creditor's being foreign, if he was so, was not considered, and he had come in before the master in the English suit.

§ 108. But if the persons who are in possession of the foreign assets of one who died domiciled in England should object to rely on the discharge which the English court can give them as against the creditors of the deceased, it may be doubted whether that court would restrain by injunction foreign proceedings for administration, further than as such proceedings might be directed to the distribution of the surplus. To restrain them further would not be consistent with that view of the authority of the *situs* over the assets on which § 104 is based.

§ 109. If the accounts of a foreign administrator have to be taken in the English court, through his submission or otherwise, he will be allowed such commission on his transactions under his foreign

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grant as would be allowed him in the jurisdiction from which it issued.

The Indian commission of 5 per cent. was allowed in *Chetham* v. *Audley*, 1798, 4 Ves. 72, Arden affirmed by Loughborough, and *Cockerell* v. *Barber*, 1826, 1 Sim. 23, Leach. It was disallowed in *Hovey* v. *Blakeman*, 1799, 4 Ves. 596, Arden, on the facts as to the transactions; and in *Freeman* v. *Fairlie*, 1817, 3 Mer. 24, Grant, because the will gave a legacy to the executor for his trouble, which it must have been considered would defeat his title to the commission even by Indian practice.

§ 110. Every administrator, principal or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased, whether contracted in the jurisdiction from which the grant issued or out of it, and whether owing to creditors domiciled or resident in that jurisdiction or out of it, in that order of priority which according to the nature of the debts or of the assets is prescribed by the law of the jurisdiction from which the grant issued.

This rule is an immediate consequence of the maxim of private international law that the priorities of creditors in a *concursus* are determined by the *lex fori* or *lex concursus*, which indeed is almost an inevitable maxim, for if two debts were contracted under different laws, and each by the law under which it was contracted would be prior to the other, how shall their order of priority be determined if not by the law of the forum where they meet? Mediately, the rule is a consequence of the authority which English law attributes to the *situs* over the assets themselves, as distinct from the beneficial interest in the clear surplus of them; for it is by reason of that authority that English law first requires the assets to be possessed under a grant in the *situs*, and then establishes a *concursus* in order to clear from debt the assets so possessed before the law of the deceased's domicile can affect their beneficial surplus. If the authority of the domicile or political nationality were admitted to extend over the gross instead of over the net property left by the deceased, which is the general continental view, the succession would be opened, as the phrase is, in the country of the domicile or political nationality, the *concursus* of creditors would be there, and the law

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of that country would determine their order of priority, as on the continent it is generally held to do. In fact, in that system, it is not a *concursus* against the assets but against the heir, although his liability may be limited by the benefit of inventory; and the heir is determined for all jurisdictions by the law of the deceased's personal jurisdiction, in which the succession is opened.

This § was cited with approval in *Re Klæbe, Kannreuther* v. *Geiselbrecht*, 1884, 28 Ch. D. 175, Pearson. The learned judge added: "No doubt, in a case in which French assets were distributed so as to give French creditors, as such, priority, in distributing the English assets the court would be astute to equalize the payments, and take care that no French creditors should come in and receive anything till the English creditors had been paid a proportionate amount. But subject to that, which is for the purpose of doing that which is equal and just to all the creditors, I know of no law under which the English creditors are to be preferred to foreigners." See also the authorities quoted under the next §.

§ 111. If, through the submission of a foreign administrator or otherwise, foreign assets are being judicially administered in England, the court will apply them as the foreign representative should have done, that is, will assign to the creditors as against any particular assets that order of priority which is prescribed by the law under the authority of which those assets were reduced into possession.

In *Hanson* v. *Walker*, 1829, 7 L. J. Ch. 135, Leach, the produce of foreign land belonging to a testator domiciled in England was applied in the order of priority among creditors prescribed by the *lex situs*. In *Cook* v. *Gregson*, 1854, 2 Dr. 286, Kindersley, a creditor claiming on an Irish judgment was allowed priority over simple contract creditors as to property brought from Ireland, but as against the English property he ranked as a simple contract creditor, according to the rule which allows only that rank to foreign judgments, notwithstanding that the testator was domiciled in Ireland. On the contrary in *Wilson* v. *Dunsany*, 1854, 18 Beav. 293, Romilly, where also the testator was domiciled in Ireland, both the English and the Irish assets were applied on that ground in the Irish order of priority, a creditor on an English judgment being ranked against both as a simple contract creditor. This case was decided before *Cook* v. *Gregson*, but was not cited in it, and was cited with disapproval in *re Klæbe, Kannreuther* v. *Geiselbrecht*, 1884, 28 Ch. D. 175, Pearson. In *Pardo* v. *Bingham*, 1868, L. R., 6 Eq. 485, Romilly is reported to have expressed the modified view that the law of the deceased's domicile would not determine the priority of creditors as against assets foreign to the domicile, except in favour of a creditor who was domiciled in the same country with the deceased; but he was not required to apply either this doctrine or his former one, the alleged domicile of the deceased out of England not being proved. Story approves the

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doctrine which I have adopted in § 110, and says that it is established in the United States: Conflict of Laws, §§ 524, 525.

See the decisions in favour of the *lex loci concursus* as the rule for priorities in bankruptcy: *exp. Melbourn*, 1870, L. R., 6 Ch. Ap. 64, Mellish and James; *Thurburn* v. *Steward*, 1871, L. R., 3 P. C. 478, Cairns.

Two classes of duties are levied in England out of personal estate, on the occasion of the death of the owner. One, which consists of the duties on probates and letters of administration, may conveniently be called probate duty. Considered without reference to the questions which arise from the diversity of national jurisdictions, it may be described as being levied on the total value of the personal estate which passes to the executor or administrator by the grant—and, under st. 23 & 24 Vict., c. 15, s. 4, on such personal estate as the deceased may have disposed of by will under any authority enabling him to dispose of the same as he should think fit, that is, under a general power of appointment—less the amount of the debts of the deceased, payable by law out of his personal estate, which may have been paid by the executor or administrator. It is therefore a tax on the clear personal estate left by the deceased. The other class, which consists of the duties on legacies and shares of residuary estate, and may be conveniently called legacy duty, is levied on the personal estate received by the beneficial successors of the deceased. The probate duty therefore may be considered as the price of the protection which the government affords to the administrator, whether principal or ancillary, in collecting the personal estate of the deceased and clearing it of debt; and the legacy duty may be considered as the toll taken by the government on the transmission of movable wealth from a dead hand to living hands. The subject of taxation is one with which the political authority of any country can deal as it pleases, subject of course to any complaints which foreigners may make against taxation which would involve a breach of faith, but in England parliament has in fact imposed, and the courts have in fact applied, the probate and legacy duties, in a manner consistent with that difference between their apparent grounds which has just been pointed out. The domicile of the deceased is irrelevant to the probate duty, but the situation of the property the collection

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of which is supposed to be protected is relevant to it: the domicile of the person whose wealth is transmitted is relevant, and the situation of the particulars which compose that wealth is irrelevant, to the legacy duty. The rules into which these leading notions have been worked out belong to this place, as questions arising in administration before the payment over of the clear surplus, because an English executor or administrator must see to the payment of both classes of duty, so far as they are respectively incident in the particular case.

§ 112. The duty on probates and letters of administration is payable, irrespective of the domicile of the deceased:

On his corporeal chattels, negotiable instruments, and bonds or certificates payable to bearer, so far as at the date of his death they were in England, or if they were then on the high seas or in other jurisdictions, so far as they are afterwards first reduced into possession by the administrator under the grant;

And on the debts due to the deceased otherwise than in respect of negotiable instruments or bonds or certificates payable to bearer, and on his shares in companies and other incorporeal chattels, so far as at the date of his death England was the proper jurisdiction in which to recover them or otherwise reduce them into possession.

In other words, probate duty is payable on the personal estate which passes primarily by the English grant, pursuant to §§ 63, 95, 96, and not on any other personal estate for which an English administrator may be accountable pursuant to § 103, or which may be recoverable by or in the presence of an English administrator pursuant to §§ 99 or 100.

That probate duty is not payable on the proceeds of foreign property which the administrator could not have recovered or reduced into possession by means of the grant, although having received them he may be accountable for them in England, was treated as certain by Alexander and Bayley in deciding *re Ewin*, 1830, 1 Cr. & J. 151, 1 Tyr. 91, and was decided in *Att.-Gen.* v. *Dimond*, 1831, 1 Cr. & J. 356, Lyndhurst, Bayley, and (?). In both these cases foreign government stocks were in question. It was decided again by the court of exchequer, and by the house of lords (Brougham) on appeal, in *Att.-Gen.* v. *Hope*, 1834, 1 Cr. M. & R. 530, 8 Bl. N. R. 44, 2 Cl. & F. 84, in which case foreign government stocks, debts due from persons domiciled and resident abroad, and goods which at the time of the death were in foreign countries in the hands of agents for sale, were in question, but the duty had been paid without question

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on goods which at the time of the death were on the high seas. I think it may be assumed that the goods in the hands of agents for sale were sold by them and not sent home again, and that if there had been any goods in foreign jurisdictions at the time of the death which afterwards arrived in this country and were here reduced into possession by the administrator, duty would have been payable on them as well as on those which were on the high seas at the time of the death : at least the case is no authority to the contrary. In *Att.-Gen.* v. *Pratt*, 1874, L. R., 9 Ex. 140, Amphlett reserved his opinion as to the incidence of probate duty on property on board ship at the date of the death, but Kelly was clear in its favour, and there seems to be no reason for a doubt.

Probate duty has been held to be incident on negotiable instruments found in England at the death : *Att.-Gen.* v. *Bouwens*, cited under § 96. On the shares in railway companies incorporated within the jurisdiction : *Att.-Gen.* v. *Higgins*, 1857, 2 H. & N. 339 ; Pollock, Martin, Watson. On the shares of a company incorporated by royal charter with a head office in England, although its business was chiefly carried on in India : *Fernandes' Executor's case*, 1870, L. R., 5 Ch. Ap. 314 ; Giffard reversing same case, 1869, Romilly. And on debts due from persons residing in England : *Att.-Gen.* v. *Pratt*, 1874, L. R., 9 Ex. 140 ; Kelly, Pigott, Amphlett. But not on Indian government securities which at the death had not been converted into debts due from the East India Company in England, although the deceased had declared his option for such conversion : *Pearse* v. *Pearse*, 1838, 9 Sim. 430, Shadwell.

In *Partington* v. *Att.-Gen.*, 1869, L. R., 4 E. & I. A. 100, administrations had been taken out to the estates of two persons, though by applying the doctrine of § 65 only one would have been necessary, as Lord Westbury pointed out. Westbury held that the duty on the unnecessary grant ought not to be exacted, but Hatherley, Colonsay, and Cairns held that whether that grant was unnecessary or not the duty must be paid on it, since it had been taken out. Chelmsford and Cairns considered it to have been necessary, but they cannot be cited in opposition to the doctrine of § 65, the bearing of which on the case they do not seem to have had clearly in view. As reported in the courts below, the case has no importance for private international law : 1 H. & C. 457 ; 3 H. & C. 193.

See *Blackwood* v. *The Queen*, 1882, 8 Ap. Ca. 82, Hobhouse ; a case on the construction of a statute of the colony of Victoria, imposing a probate duty to which all legatees were to contribute proportionally, instead of its being borne entirely by the residuary legatees as the English probate duty is borne. The judicial committee held that this circumstance did not prevent the statute from being construed as imposing the duty only on property passing by the grant, and therefore not on personalty out of Victoria.

§ 113. Where the deceased leaves assets in different jurisdictions, and foreign assets not liable to English probate duty reach the hands of the English administrator, the latter will nevertheless be entitled to a return of duty corresponding to the whole amount of the debts paid by him.

Reg. v. *Commissioners of Stamps and Taxes*, 1849, 13 Jur. 624 ; Denman, Patteson, Coleridge.

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§ 114. The duty on legacies and shares of residue arising out of movable property is payable when and only when the last domicile of the deceased was in the United Kingdom, and is then payable on the entire amount of the deceased's legacies and residue, whether produced or not from assets received under any British grant, and whatever may be the domicile of the legatees or persons interested in the residue.

The old authorities did not make legacy duty depend on domicile, but on the estate being administered in England, including all the cases of §§ 63, 95, 96, 99, 100, 103. *Att.-Gen.* v. *Cockerell*, 1814, 1 Price, 165; Thomson, Richards, and (?): *Att.-Gen.* v. *Beatson*, 1819, 7 Price 560; court of exchequer: *Logan* v. *Fairlie*, 1825, 2 S. & St. 284, Leach. The domicile of the deceased was introduced as the determining fact in *Re Ewin*, 1830, 1 Cr. & J. 151, 1 Tyr. 91; Alexander, Bayley, Garrow, Vaughan. The political nationality of the deceased was taken as the determining fact, in a case however where that criterion and domicile gave the same result: *Re Bruce*, 1832, 2 Cr. & J. 436; Lyndhurst, Bayley. But in the same term the same court again took domicile as the determing fact, and this time in a case where political nationality would not have given the same result: *Jackson* v. *Forbes*, 1832, 2 Cr. & J. 382, 2 Tyr. 354; Lyndhurst, Bayley, Vaughan, Bolland. Lord Brougham acted in the court of chancery on the certificate given by the court of exchequer in the last case, and this was affirmed by the house of lords, *sub nom. Att.-Gen.* v. *Forbes*, 1834, 8 Bl. N. R. 15, 2 Cl. & F. 48, Brougham, Plunkett; but in the reasons given the old authorities were expressly saved, so as to leave it possible that the duty might be payable although the domicile was out of the United Kingdom, if the assets were administered in the United Kingdom, previous to any such specific appropriation of them as is mentioned in § 99. In *Logan* v. *Fairlie*, 1835, 1 My. & Cr. 59, Pepys and Bosanquet (a further decision on the case before Leach above cited, in which a different view of the facts was taken), and *Arnold* v. *Arnold*, 1836, 2 My. & Cr. 256, Cottenham, the doctrine remained at the point where *Att.-Gen.* v. *Forbes* had left it. Finally, the doctrine expressed in the § was established by *Thomson* v. *Advocate-General*, 1845, 12 Cl. & F. 1, 13 Sim. 153; Lyndhurst, Brougham, Campbell; Tindal delivering the unanimous opinion of the judges to the same effect.

After the passing of the succession duty act it was contended that that act had imposed legacy duty under a different name on legacies and shares of residue left by persons dying domiciled abroad, so far as realised out of assets administered in Great Britain. In *re Wallop*, 1864, 1 De G. J. & S. 656, Turner expressed an opinion in favour of this contention, which however was not necessary to the decision: see under § 116. In *re Capdevielle*, 1864, 2 H. & C. 985, Martin and Channell followed this opinion, and Pollock was prepared to follow it if he had thought the case turned on the point; but all evidently against their personal opinions, as well as that of Bramwell. The contention was ultimately repelled in *Wallace* v. *Att.-Gen.* and *Jeves* v. *Shadwell*, 1865, L. R., 1 Ch. Ap. 1, Cranworth.

§ 115. An administrator under an English grant is liable to

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account to the crown for the legacy duty on the whole of the clear personal estate of the deceased, to the extent of the clear surplus of all such assets as he has received under any British grant.

Att.-Gen. v. *Napier*, 1851, 6 Exch. 217, Parke and Alderson. It will be observed as to this case that the acts of parliament imposing the legacy duty bind all British courts, though they do not impose the duty for all the British dominions. It would be a different thing to hold the administrator liable for the duty to the extent of assets received by him under the grant of a politically foreign jurisdiction, in which he might be accountable for them, and which might ignore the English revenue laws.

I said on p. 121 that two classes of duties are levied in England out of personal estate on the occasion of the owner's death. More strictly it should have been, on the occasion of the absolute owner's death; and the difference will now be explained. By the English system of settlements personal estate through the intervention of trustees, and real estate either with or without the intervention of trustees, are tied to go to a series of persons in succession one after another, who may be called owners to the extent of their limited interests, beneficiary owners if there are trustees, full owners if there are not. It is from this limited ownership that absolute ownership is distinguished. Thus it continually happens that property, full or only beneficiary, is transmitted on the death of a limited owner and the simultaneous expiration of his ownership, the devolution not being determined by the will of the deceased owner, or by the operation of law as on his property, but by the terms of the settlement under which the property is held. And that settlement may be the will of some former absolute owner, a marriage contract, or a disposition *inter vivos* otherwise than on marriage. Such cases are analogous to the division of the property into the usufruct and the *nuda proprietas* so well known on the continent, although a commoner continental mode of securing the enjoyment of property by a series of persons in succession was by giving to the first taker what was nominally the absolute property, but charged with the duty of preserving it and passing it on to a third person, which was called a substitution. Under an English settlement the first taker may be also the trustee, and then he has in the one character the terminable enjoyment of what in the other character he must preserve and trans-

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mit. The union in the same character of the right to the enjoyment with the duty of transmission, which is the essential note of a substitution, does not occur under English law. Since however substitutions have been prohibited in many countries—Code Napoleon, art. 896—authors and courts of justice have made great efforts to uphold as usufruct and *nuda proprietas* many dispositions which would formerly have taken effect by way of substitution. Now the duties which have thus far been considered are those levied on the occasion of the death of an absolute owner, and we must now consider those which by the succession duty act, passed in 1853, are imposed on the transmission of personal estate at the death of a limited owner whose ownership expires with his life. These fall within the present chapter, the subject of which is the succession to movables on death, and they may be conveniently noticed immediately after the probate and legacy duties, although their relation in principle to each of the latter is rather one of contrast than of analogy. Even a contrast however is instructive.

First then the succession duty has no analogy at all to the probate duty. On the death of a limited owner the property has not to be collected under public authority: it is already massed together in the hands of the trustees, or possesses a visibly separate existence as real estate, though with the latter case we have not now to deal. Nor is there any question of clearing it from the debts of the deceased owner, for he could not burden it with debt beyond the duration of his own limited ownership. Secondly, the succession duty on movable property is, like the legacy duty, a toll taken by the government on transmission from a dead hand to living hands, but the wealth transmitted is not the wealth of the deceased—his interest in it is not transmitted but has terminated—and therefore his domicile would not appear to be relevant to its taxation. The successor derives his title not from him or from the operation of law as on his property, but from the original settlement. It might therefore have been reasonable to adopt as the ground of taxation either the domicile of the successor or something in the settlement, and the act, as interpreted by the courts, has done the latter. The duty attaches when the settlement is a British one, in the sense in

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which that term refers to the United Kingdom and not to other British countries. What it is in a settlement which constitutes it a British one will appear from the next §.

§ 116. When by a will, a marriage contract, or any other disposition *inter vivos*, movable property has been placed in trust for a series of persons in the hands of trustees personally subject to the jurisdiction of court in the United Kingdom, so that such court by reason of such subjection is the proper forum for deciding on claims to the successive enjoyment of the property, succession duty will be payable on the devolution of the enjoyment from one person to another irrespective of the domicile of either of them or of the settlor. It makes no difference whether the settlement (will, contract, or gift) itself completely determines the line of devolution, or gives to any one the power of determining it, to be exercised in any manner. If the person to whom such a power is given (donee of a power of appointment—see § 91) is domiciled out of the United Kingdom, and exercises the power by will, succession duty will nevertheless be payable on the devolution so determined, because it is still the case of a devolution under the settlement and not of a legacy under the will of the donee. If the settlement be made by the will of a person domiciled out of the United Kingdom, the fund, being a legacy left by such will, is not subject to legacy duty on being placed in the hands of the trustees, but succession duty will be payable on the subsequent devolutions of the enjoyment of it.

Succession duty has been held to be payable in the following cases:—

Notwithstanding that the devolution took place through the execution of a power by the will of a person domiciled abroad. *Re Lovelace*, 1859, 4 De G. & J. 340, Knight-Bruce and Turner: *Re Wallop*, 1864, 1 De G. J. & S. 656, Knight-Bruce and Turner.

Notwithstanding that the settlement was created by the will of a testator domiciled abroad. *Re Smith*, 1864, 12 W. R. 933, Stuart: *Re Badart*, 1870, L. R., 10 Eq. 288, Malins: *Att.-Gen.* v. *Campbell*, 1872, L. R., 5 E. & I. A. 524; Hatherley, Chelmsford, Westbury, Colonsay; reversing same case, *sub nom. Callanane* v. *Campbell*, 1871, L. R., 11 Eq. 378, Romilly. In *Lyall* v. *Lyall*, 1872, L. R., 15 Eq. 1, second point, where a testator domiciled in New South Wales directed his colonial executors to transmit his residuary estate to trustees in England for investment, but no part of that estate had reached the hands of those trustees before a succession took place under the trusts declared of it by

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the testator, Romilly held that duty in respect of that succession was not payable on the estate which afterwards reached the hands of the trustees. There was therefore a clear distinction on which he might have put the decision, but after a long criticism of the judgment of the house of lords in *Att.-Gen.* v. *Campbell*, in connection with the first point in the case before him, all he said on the second point was: "I hold that no duty is payable on those funds which constitute the residuary estate of the testator."

Notwithstanding that the funds on which the duty is claimed reached the hands of the English trustees after the date when the succession took place, the right to them having however been vested in the trustees previous to that date. *Lyall* v. *Lyall*, 1872, L. R., 15 Eq. 1, first point, Romilly. But consider the second point in this case, cited in the last paragraph.

Notwithstanding that the property vested in the English trustees consists of the stocks of foreign governments and shares in foreign companies. *Re Cigala*, 1878, 7 Ch. D. 351, Jessel.

Notwithstanding that all the trustees are not personally subject to the jurisdiction of a court in the United Kingdom, so long as it is practically necessary for those who claim as beneficiaries to sue the trustees in the United Kingdom. *Re Badart* and *Att.-Gen.* v. *Campbell*, cited above. In *re Cigala* one of the original trustees was an Italian, though at the time of the decision all the trustees were English.

In several of the cases the judges refer to the settled money being in the British funds, or in some other way having a kind of local situation in the United Kingdom, as for example by the residence of the debtor from whom the trustees would have to recover it. But in no case has the succession duty been held to be incident on that ground where the trustees or one or more of them were not British, and the principle of *re Cigala*, in which the duty was held to attach on the devolution of an interest in foreign funds held by British trustees, should apply to prevent its attaching on the devolution of an interest in British funds held by exclusively foreign trustees. In that case Sir G. Jessel said: "This is not real property, but personal property in the hands of English trustees, and you cannot get it from them except by an action in England. That is the true test; in order to recover the property you must come to England."

§ 117. Any duty which must be paid abroad on the assets of a person whose last domicile was in England must be deemed to be paid out of his residue, so that his particular legatees will not have to contribute to it, notwithstanding that they would have to do so by the law of the country where the duty is imposed.

Peter v. *Stirling*, 1878, 10 Ch. D. 279, Malins.

Since the beneficial interest in the surplus of the deceased's personal property is governed by the law of his last domicile (§ 59), and therefore by one law no matter in how many jurisdictions the assets may be found, it might seem to be of no importance out of

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what assets any of the debts are paid. This however is not always so. Let us suppose that the deceased had immovable property in a country foreign to his domicile, and in which the succession to immovables is held to be governed by the *lex situs*; and that a debt of the deceased is paid by the heir of that property, or by a devisee of it taking under a will in which no intention as to the incidence of the debt in question is expressed. Evidently it is only by the *lex situs* that a debt can be charged primarily on immovables in exoneration of the personalty. If therefore by the *lex situs* itself the heir or devisee has recourse against the personalty for the amount of the debt which he has paid, there is no conflict of laws, and it would seem to be clear that he can have his recourse in every jurisdiction in which he can find assets. And so it has been settled in England, after a dispute which it is not easy to understand. But if by the *lex situs* the debt was charged primarily on the immovable, the peculiar succession which the heir or devisee enjoys under that law is limited by that law itself to so much of the immovable as remains after paying the debt. The only law to which he can appeal, because it is the only one by virtue of which he is at all either a beneficial successor or a transferee of the debt, does not enable him to stand against the general succession in the place of the creditor whom he has paid, and there can be no reason for giving him that recourse in any other jurisdiction. This also has been settled in England, and the result is that the right of recourse is in each case determined by the *lex situs*. Hence:

§ 118. The right of the heir of foreign immovables, or of their devisee when no intention on the point is expressed by the will, to have recourse against the personal estate in England for the amount of debts of the deceased which he has paid, is determined by the *lex situs* of the immovables.

Recourse allowed where it was allowed by the *lex situs*. *Bowaman* v. *Reeve*, 1721, Pre. Ch. 577, Macclesfield; apparently the same case as the *Anonymous* one in 9 Mod. 66, there dated as of 1723: *Winchelsea* v. *Garetty*, 1838, 2 Keen 293, Langdale. In the former case the deceased was domiciled in the *situs* of the immovables, and in the latter in England.

Recourse refused where it was refused by the *lex situs* (case of Scotch heritable bonds). *Drummond* v. *Drummond*, 1799, 6 Bro. P. C. 601, 2 Ves. & Be. 132: *Elliott* v. *Minto*, 1821, 6 Madd. 16, Leach. In the former case the deceased was domiciled in England, but in the latter the domicile is not stated.

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§ 119. The rate of interest with which an executor or administrator will be charged on assets in his hands is not necessarily either that usually given in the forum, or that usually given in the domicile of the deceased, but will be that usually given in the country where the assets have been, supposing of course that there has been no improper removal of them from one country to another, or improper retention of them in any country.

Malcolm v. *Martin*, 1789, 3 Bro. Ch. 50, Arden ; *Raymond* v. *Brodbelt*, 1800, 5 Ves. 199, Rosslyn ; *Bourke* v. *Ricketts*, 1804, 10 Ves. 330, Grant. The last case shows that, as a consequence of this rule, where there are assets and executors in two or more countries, the interest which a legatee will get may depend on which country he chooses to sue in.

Distribution of the Surplus in an Administration.

The beneficial interests according to which the clear surplus of a deceased person's estate is to be distributed are determined, whether in the case of testacy or in that of intestacy, by the law of his last domicile. This maxim was laid down in § 59, as being necessary to the understanding of much that had to follow, for instance the deference paid to the courts and law of the domicile with regard to the grant of probate or administration, and to the validity of wills; and in the remainder of this chapter we have simply to follow out its consequences, being henceforth free from the complications which, before a clear surplus was realized, arose out of the authority over the assets themselves which is allowed in England to the *situs*. We may notice in passing a question raised by Lord Alvanley, in *Somerville* v. *Somerville*, 1801, 5 Ves. 791: "what would be the case upon two contemporary and equal domiciles, if ever there can be such a case?" It has remained a speculative one, so far as the experience of the English courts is concerned, and I will therefore not make a § of it, but lord Alvanley's answer may be given. "I think," he proceeded, "such a case can hardly happen, but it is possible to suppose it. A man born no one knows where, or having had a domicile that he has completely abandoned"—I stay to remark on this that it is now settled the domicile of origin reverts on the abandonment of an acquired one—"might acquire in the same or

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different countries two domiciles at the same instant, and occupy both under exactly the same circumstances, both country houses for instance, bought at the same time. It can hardly be said that of which he took possession first is to prevail. Then suppose he should die at one, shall the death have any effect? I think not, even in that case; and then *ex necessitate* the *lex loci rei sitæ* must prevail, for the country in which the property is would not let it go out of that until they know by what rule it is to be distributed. If it was in this country, they would not give it until it was proved that he had a domicile somewhere." Savigny on the other hand says: "On the death of a vagabond who had no domicile, the law of his origin determines; and if this too cannot be ascertained, the law of his last residence, that is, of the place where he died."*

§ 120. The clear surplus of an intestate's personal estate is distributable among the persons, and in the shares, determined by the law of his last domicile.

Pipon v. *Pipon*, 1744, Ambl. 25, Hardwicke; *Thorne* v. *Watkins*, 1750, 2 Ves. 35, Hardwicke. The old Scotch authorities on the subject, which appear to have fluctuated, will be found in *Bruce* v. *Bruce*, 1790, 6 Bro. P. C. 566, and *Balfour* v. *Scott*, 1793, 6 Bro. P. C. 550, the appeals in which cases settled the rule for Scotland in the same sense in which it existed for England. Lord Thurlow's speech in *Bruce* v. *Bruce* will be found in another report, 2 Bos. & Pul. 229, note.

§ 121. Hence if the intestate leaves immovables in a country foreign to his domicile, the law of which does not admit the application of the *lex domicilii* to the succession to immovables, but confers that succession on a peculiar heir, excluding him at the same time from a share in the movables except on condition of bringing into hotchpot or collating immovables, such heir may nevertheless, under the *lex domicilii*, claim his share of the movables in both countries without collating the immovables.

Balfour v. *Scott*, 1793, 6 Bro. P. C. 550; a Scotch appeal. See also § 125.

§ 122. The operation of his will on the clear surplus of a testator's movables is also determined, so far as concerns questions other than

* Syst. d. heut. Röm. rechts. § 375, note (*b*); Guthrie's translation, p. 223.

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those of construction, by the law of his last domicile. Hence if any of his dispositions are invalid by that law, whether as being in excess of the disposing power allowed by it or for any other reason, they will fail of effect, and the same law will determine the destination of the movables comprised in them. Compare § 86.

The right of a widow or child to legitim, and consequently to defeat to that extent any contrary disposition made by the testator, depends on the law of the latter's last domicile, and not on that of the *situs* of the personal estate. *Hog* v. *Lashley*, 1792, 6 Bro. P. C. 577, 3 Hagg. Eccl. 415, note; house of lords, on Scotch appeal. See also *Thornton* v. *Curling*, 1824, 8 Sim. 310, Eldon; *Campbell* v. *Beaufoy*, 1859, Johns. 320, Wood.

The validity of a condition in restraint of marriage attached to a legacy depends on the law of the testator's last domicile. *Ommaney* v. *Bingham*, or *Sir Charles Douglas's case*, 1796, 3 Ves. 202, in *Bempde Johnstone*; 5 Ves. 757, in *Somerville* v. *Somerville*; 3 Hagg. Eccl. 414, note; 6 Bro., P. C. 550, in head note to *Balfour* v. *Scott*; Loughborough and Thurlow on a Scotch appeal.

The domicile of the testatrix being English, a legacy to a person who predeceased her lapsed under the English rule, though it would not have lapsed by the law of the country where, and in the technical language of which, the will was made. *Anstruther* v. *Chalmer*, 1826, 2 Sim. 1, Leach.

The validity of a legacy bequeathed for charitable uses depends on the law of the domicile, so far as the personal estate is concerned: and if the testator leaves immovables in a country foreign to his domicile, the law of which does not admit the application of the *lex domicilii* to the succession to immovables, and invalidates a charitable legacy under the circumstances of the case, it depends on the law of the domicile whether such legacy will be payable in full so far as the personal estate admits, or will be invalid for the proportion which the testator's property out of which it is not payable bears to that out of which it is payable. *Macdonald* v. *Macdonald*, 1872, L. R., 14 Eq., Bacon.

The subject of construction may best be introduced by a quotation from Lord Lyndhurst's speech in the Scotch appeal of *Trotter* v. *Trotter*, cited under § 125. "It was stated at the bar," he said, "and I see by the papers it was also argued below, that in cases of this description it is not unreasonable that when any technical points arise in the construction of a will of this description, the court of session should resort to the opinion of lawyers of the country where the will or instrument was executed, but that this only applies to technical expressions: that where a will is expressed in ordinary language, the judges of the court of Scotland are as competent to put a proper construction upon it as judges or lawyers

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of the country where the will was executed. But the judges below were not of that opinion; and it is impossible, as it appears to me, that such an opinion can be reasonably entertained. A will must be interpreted according to the law of the country where it was made, and where the party making the will has his domicile. There are certain rules of construction adopted in the courts, and the expressions which are made use of in a will and the language of a will have frequently reference to those rules of construction; and it would be productive therefore of the most mischievous consequences, and in many instances defeat the intention of the testator, if those rules were to be altogether disregarded, and the judges of a foreign court, which it may be considered in relation to the will, without reference to that knowledge which it is desirable to obtain of the law of the country in which the will was made, were to interpret the will according to their own rules of construction. That would also be productive of another inconvenience, namely that the will might have a construction put upon it in the English courts different from that which might be put upon it in the foreign country. It appears to me that there is no solid ground for the objection, but that where a will is executed in a foreign country by a person having his domicile in that country, with respect to that person's property the will must be interpreted according to the law of the country where it is made. It must, if it comes into question in any proceeding, have the same interpretation put upon it as would be put upon it in any tribunal of the country where it was made. It appears to me therefore that the judges were perfectly right in directing the opinion to be taken of English lawyers of eminence with respect to the import and construction of this will according to the law of England."

Lord Lyndhurst here assumed that the will was made in the testator's domicile. If it was made in a different country the English authorities are to the effect that the law of the domicile prevails. And formerly it was the law of the testator's last domicile that was meant. But now, through the provision in Lord Kingsdown's act that the construction of a will shall not be altered by reason of any subsequent change of domicile of the person making

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the same—see § 85—it has come to be the law of the testator's domicile at the time of making his will which must be referred to for its construction. This I take to be a real improvement, and not to be inconsistent with the general authority of the last domicile of the deceased over the beneficial interest in the clear surplus of his estate. Interpretation being a question of fact, the law which decides on the validity of a bequest when it has been construed may well look beyond itself for aid in construing it.

Further, the question of construction is not always easy to distinguish from that of operation. Thus *Anstruther* v. *Chalmer*, quoted under § 122, might be treated as turning on a question of construction, namely whether a gift to the representatives of the legatee, which would be valid by English law, ought not to be held as implied by a legacy bequeathed in the technical language of a law under which lapse would not occur through the decease of the legatee in the testator's lifetime. And the clearer it is in any case that the question is one of construction as distinguished from operation, the freeer it is to the court to temper the general reference to the law of the domicile by reference to other considerations which the particular circumstances may suggest.

From all this the following rule appears to result.

§ 123. When the English court is called on to construe a will of personal estate, and is not aided by any judgment in the testator's last domicile, as to which see § 60, it will take as its guide the law of the country which was the testator's domicile at the date of the will, giving effect to any stringent rules of construction which there exist, and, so far as no such rules exist there, having a reasonable regard to all the circumstances, including any habits or tendency of the courts of that country in the matter of interpretation which may be proved by the evidence of experts.

The currency in which a legacy is given must in general be interpreted to be that of the testator's domicile, though the context of the will, or the situation of the funds on which the legacy is expressly charged, may make a difference: *Saunders* v. *Drake*, 1742, 2 Atk. 465, Hardwicke; *Pierson* v. *Garnet*, 1786, 2 Bro. Ch. 38, Kenyon, who spoke of the place where the will was made, but that was the same as the domicile; *Malcolm* v. *Martin*, 1789, 3 Bro. Ch. 50, Arden. And if a legacy given in the currency of a foreign domicile has to be paid in England, so much English money must be paid here as if paid in the

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domicile would there produce the amount in the currency of that country: *Cockerell* v. *Barber*, 1810, 16 Ves. 461, Eldon; *Campbell* v. *Graham*, 1830, 1 Ru. & My. 453, Leach, with whom Brougham concurred in opinion, as he stated on the appeal to the house of lords, *sub nom. Campbell* v. *Sandford*, 1834, 2 Cl. & F. 450.

A will was construed by the law of the testator's domicile, on the question whether a legacy given by it was in satisfaction of a debt under a foreign matrimonial contract: *Campbell* v. *Campbell*, 1866, L. R., 1 Eq. 383, Wood.

See a peculiar case of construction, not inconsistent with the doctrine of the present §: *Bernal* v. *Bernal*, 1838, 3 M. & Cr. 559, Cottenham.

A testator bequeathing his "estate," "effects," or "property" in a given country *prima facie* intends to comprise debts due to him from persons residing in that country. *Nisbett* v. *Murray*, 1799, 5 Ves. 149, Arden: *Arnold* v. *Arnold*, 1834, 2 My. & Ke. 365, Pepys: *Tyrone* v. *Waterford*, 1860, 1 D. F. J. 613; Knight Bruce, p. 628, and, less distinctly, Campbell and Turner: *Guthrie* v. *Walrond*, 1883, 22 Ch. D. 573, Fry.

All that can be collected from *Bradford* v. *Young*, 1884, 26 Ch. D. 656, Pearson; 1885, 29 Ch. D. 617, Cotton, Lindley and Fry; appears to be that technical terms of a law foreign to the testator's domicile, occurring in a testamentary disposition of movables, may be construed according to the law in which they are technical if there is a sufficient indication of intention to that effect, but that the higher court was not disposed to be easily led to look beyond the law of the domicile.

§ 124. Together with § 123 may have to be taken a qualification, arising out of the maxim that the admissibility of evidence is governed by the *lex fori*—see above, pp. 9, 38—which had best be expressed in the words of lord Brougham on a Scotch appeal. "It by no means follows that where a sentence of a foreign court is offered in evidence in court, the probate for example of an English will, it should not be admitted; nor do I think it should be denied its natural and legitimate force. But that it must like all other instruments be received upon such proof as is required by the rules of evidence followed by the court before which it is tendered, I hold to be quite clear. It will follow that though a probate striking out part of a will would be received, and the court of session would have no right to notice the part struck out, for this would be reversing or at least disregarding the very sentence of the court of probate, yet the non-probate of a person's will would not prevent the court from receiving and regarding that will, if its own rules of evidence did not shut it out. So too it is unnecessary to decide here what would be the course in the Scotch courts in the case of

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an English will of personalty attested by one witness, after an act should have passed requiring two"—as has since happened. "I think that though it might be admissible in evidence by the rules of evidence which would then govern, yet no effect could be given to its disposition because of the rules of English law requiring two witnesses, that being a requisition not of form, in order to make the paper evidence, but of substance, in order to protect testators on their dying beds."

This was applied, in the case where it was said, by holding that the Scotch court could look at a will made by a testator domiciled in England, which had not been admitted to probate in England because it had been revoked by a subsequent will there proved, for the purpose of aiding in the construction of a trust deed, or third will, which seems to have been operative in Scotland with regard to money in a Scotch bank: *Yates* v. *Thomson*, 1835, 3 Cl. & F. 544. Since the law of England is remarkable for severity in excluding writings as evidence, it is not likely that the English court will be asked to look at a writing excluded by the *lex domicilii*, even if lord Lyndhurst's doctrine—above, p. 133, that a will ought to "have the same interpretation put upon it as would be put upon it in any tribunal of the country where it was made," say rather "where the testator was domiciled," should not be thought inconsistent with lord Brougham's ruling in *Yates* v. *Thomson*, and of superior authority.

§ 125. If a testator leaves immovables situate in a country foreign to his domicile, and his will is inoperative as to them, but it is contended that by reason of an intention to devise them manifested in it the person who is heir to them by the *lex situs* is put to elect between them and money given him by the will, the question whether he is so put to elect, being one of the construction and operation of the will as affecting the disposition of the movable estate, falls under §§ 122 and 123.

Brodie v. *Barry*, 1813, 2 V. & B. 127, Grant: *Trotter* v. *Trotter*, 1829, 4 Bl. N. R. 502, 3 Wils. & Sh. 407, Lyndhurst: *Johnson* v. *Telford*, 1830, 1 R. & M. 244, Leach: *Dundas* v. *Dundas*, 1830, 2 D. & C. 349, Brougham: *Allen* v. *Anderson*, 1846, 5 Ha. 163, Wigram: *Dewar* v. *Maitland*, 1866, L. R., 2 Eq. 834, Stuart. See also § 121.

§ 126. In the English statute of distributions, and in a bequest of personalty by a testator domiciled in England, the word "child," whether qualified or not by the epithet "legitimate," includes a child

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who has been legitimated *per subsequens matrimonium* in the circumstances deemed necessary in England for the recognition of such a legitimation, as to which see above, pp. 89—91.

Goodman v. *Goodman*, 1862, 3 Giff. 643, Stuart (bequest): *Re Goodman*, 1881, 17 Ch. D. 266, Cotton and James against Lush, reversing Jessel, 1880, 14 Ch. D. 619 (statute): *Re Andros*, 1883, 24 Ch. D. 637, Kay (bequest). There is a contrary decision, *Boyes* v. *Bedale*, 1863, 1 H. & M. 798, Wood (bequest); but Cotton and James dissented from it in deciding *re Goodman*.

The doctrine of § 126 will no doubt be held equally to apply to the devise of English land. The principle is that in the will of an Englishman "child" must be interpreted according to English law, which recognizes legitimation by the appropriate foreign law, and this is independent of the peculiar rule that the heir *ab intestato* of English land must have been born in wedlock, as to which see below, § 178.

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CHAPTER VI.

BANKRUPTCY.

THE principal remaining case, after those connected with marriage and death, in which property is considered in special connection with a person is that of bankruptcy. In that term I include all the modes in which a *concursus* or competition of creditors is formed against the property of a living person, or of a firm or company having a legal personality, whether the technical name in the particular instance be bankruptcy, insolvency, sequestration, *cessio bonorum*, winding up, or any other, and whether the persons who administer the property for the creditors are technically called trustees, assignees, curators, liquidators, syndics, or any thing else, all which names may be considered as comprized when the term trustees is used. And in the present chapter those questions of private international law shall be discussed which arise out of the collection and distribution of the debtor's property in such competitions, leaving those which concern his discharge, usually but not always connected with such competitions in national law, until we arrive at the modes of extinguishing obligations.

"As the bankruptcy," said Savigny in 1849, "has in view an adjustment of the claims of a number of creditors, it is possible only at one place, namely at the domicile of the debtor, so that the special forum of the obligation is here displaced by the general personal forum."* The direct conclusion from this view is that which Savigny, himself approving it, expressed in the following passage with reference to the then state of Prussian law. "By this" [the Prussian] "law there is always only one bankruptcy, and that at the domicile of the common debtor.

* Syst. d. heut. Röm. rechts, § 374; Guthrie's translation, p. 209.

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The judge in bankruptcy procures by requisition the cooperation of the Prussian courts in whose territory parts of the estate are situated. If parts of the estate are abroad, then the judge has to enquire whether there are public treaties. If there are none, he must propose to the foreign judge to cooperate in the bankruptcy in Prussia, in the same way as has already been indicated in regard to Prussian courts. If this fails the curator has to watch the interest of the creditors in this country" [Prussia] "in the special bankruptcy abroad. All treaties concluded subsequently to this law rest on the principle that only one bankruptcy is to take place, and that as a rule at the domicile of the debtor. The goods of the common debtor situated in the other state must be sold, and the proceeds handed over to the court of bankruptcy. In this all the creditors must appear. The marshalling (ranking) of the creditors is determined for the purely personal claims according to the law of the forum, for all real rights according to the laws of the place where the thing is situated. There is a difference only in this respect, that by the modern treaties (since 1839) real rights in things situated out of the country of the bankruptcy can be insisted on also at the place where the thing is situated, before its surrender to the judge of the bankruptcy. If this is done by hypothecary creditors, the things hypothecated are to be sold there, the money paid to the creditors, and only the surplus if any is to be paid into the court of bankruptcy."*

There was no doubt a time when among the judges in different European provinces the custom was widely spread of assisting each other's proceedings in bankruptcy as indicated by Savigny, except that there was always a great body of authority against allowing the operation of a foreign bankruptcy to extend to immovables, as Savigny, by no means alone in that matter, would make it do so far as concerns the satisfaction out of them of purely personal claims. But as the feeling of national distinctness and independence has been on the growth for the last three centuries, the influence of legislation has not on the whole been favourable to those liberal views, and since an institution like bankruptcy had to become more complex with the

* Savigny, u. s.; Guthrie's translation, p. 213.

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complexity of commercial relations, legislation has necessarily borne an important part in giving it its modern shape. We need not dwell on the Prussian law of 1855, which in the absence of treaty gave Prussian creditors a preference against the assets in Prussia, while still directing that the surplus of those assets after satisfying home claims should be transmitted, not to the foreign bankrupt, but to the trustees in his foreign bankruptcy. We may come at once to the bankrupt law of the German empire, that of 10 February, 1877, taking effect in 1879, which contains the following clauses.

§ 4. Foreign creditors stand on the same footing as domestic ones.

It may be determined by an order of the chancellor of the empire, with the consent of the federal council, that measures of retorsion shall be applied to persons belonging to foreign states and their assigns.

§ 5. From the commencement of the bankruptcy [this may be prior to any judicial proceeding, and dates as in England from what we call the act of bankruptcy.—J. W.] the common debtor loses the power of administering and disposing of his estate belonging to the bankruptcy.

The right of administration and disposition is exercised by an administrator in bankruptcy.

§ 39. Those assets which with regard to execution against them belong to the class of immovables are to be applied in separate satisfaction, so far as a real or special right to preferable satisfaction out of them exists.

The laws of the empire and of its component territories determine what is comprized in the immovable estate, as well as the claims to be satisfied out of it and their order.

§ 207. When a debtor whose foreign assets are affected by a bankruptcy possesses assets in the empire, execution may be had against the latter.

Exceptions may be made to this rule by an order of the chancellor of the empire, with the consent of the federal council.

§ 208. Process of bankruptcy may be applied to the assets possessed within the empire by a debtor who has no general personal forum within it [that is, who is not subject to German jurisdiction through political nationality or domicile.—J. W.] when he has in the empire an establishment for manufacture, commerce, or any other mode of earning, at or from which business is immediately concluded.

The same is the case when a debtor who has no general personal forum within the empire works within it, whether as owner, usufructuary, or tenant, any property furnished with buildings for dwelling on and working it.

The process can only be had in that court in the district of which the establishment or the property is situate.

When a bankruptcy has been commenced abroad, no proof of insolvency is necessary for commencing the process in the empire.

Thus the preference of the home creditor, which marked the Prussian law of 1855, has disappeared, except by way of retorsion;

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but in the absence of treaty, for which however the imperial chancellor and federal council are enabled to provide by the powers reserved to them, a foreign bankruptcy does not prevent execution in Germany by particular creditors.

In France and Italy a more liberal spirit towards foreign bankruptcies is displayed. The adjudication and the appointment of a trustee under it are regarded as judgments in favour of the creditors, which can be declared executory as it is termed, or clothed with an *exequatur*, that is be admitted to receive their execution, in the same manner as any other foreign judgments; and when this is done, the trustee will be in the same position as the syndic under a domestic adjudication. Such a syndic, like the German administrator under § 5 of the law just quoted, is the mandatory of the creditors, enjoying the administration of the bankrupt's estate without the latter being disseized of the property in it, and empowered to bring on behalf of the creditors all the actions which the bankrupt could have brought: *French court of cassation*, 12 January 1875. Having that position, the foreign trustee can obtain any part of the bankrupt's estate in spite of an attempt by a foreign creditor to attach it; but since Art. 14 of the Code Napoleon gives the French creditor an absolute right to sue his foreign debtor in France, an attachment by him must be allowed to proceed, yet again, since French law itself aims at the equal distribution of a bankrupt's estate, no other effect will be allowed it than that of a security for the dividends to which the French creditor may become entitled in the foreign bankruptcy: *court of appeal of Paris*, 13 August 1875. Even previous to the adjudication being declared executory the foreign trustee, at least if the fact of his being such is not disputed, can oppose whatever might prejudice his eventual rights: *court of appeal of Paris*, 7 March 1878. And he may thus defeat an attachment, though he cannot without the *exequatur* get an order for payment or delivery to himself: *court of appeal of Milan*, 15 December 1876.

The English courts have always been unable to follow precisely the continental jurisprudence in this matter, because our judges never cooperated with foreign judges in the manner referred to by Savigny in the passage above extracted, nor have we the process of

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declaring foreign judgments executory. It will be explained in a later chapter that a foreign judgment is never admitted to execution in England, but is sued on as a cause of action: consequently it is not possible for us to recognize a continental adjudication of bankruptcy in the only character which it has in its own country, that of a judgment affecting the administration of the bankrupt's estate but not disseizing him of the property in it. Again, our system of bankruptcy has no root in the Roman law as to the appointment of curators; it has not merely been modified but was founded by statute, and it operates by way of statutory assignment of the bankrupt's property to the trustees; so that even were it possible for us to declare a continental adjudication executory, it would not run parallel with our own adjudications. There has however been no want of substantial liberality on our part. As in France and Italy an English adjudication is allowed to operate, on the footing of a judgment, to a similar extent to that which the attendant statutory assignment gives it at home, so in England a foreign adjudication is allowed to operate as to movables through the fiction of its being an assignment in its own country, combined with the maxim *mobilia sequuntur personam*. Thus it has been classed among what in these islands more especially it is usual to call universal assignments, and indeed much of the British learning on that class is to be found in the cases on bankruptcy. It was in a Scotch case on bankruptcy that the dictum about "the legal assignment of a marriage" was uttered, which has been quoted above on p. 66. It may be remarked in passing that the notion of assignment is as applicable to the British system of winding up companies as it is to bankruptcies technically so called, for the estate of the company is impressed with a trust which the liquidator has to administer for the creditors, so that the beneficial interest in the estate is virtually assigned. It might even be contended on a similar ground that it is not quite a fiction to treat a foreign adjudication of bankruptcy as an assignment, but there is a difference between the cases, trusts and the beneficial interests to which they give rise not being known on the continent as here. The syndic in a French bankruptcy has a duty, and power with which to perform it; but they do not say

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there that this is attended by any peculiar modification of the property in the things about which his duty is to be performed.

An important consequence followed from the mode in which British lawyers were led to approach the subject. When a foreign bankruptcy received its effect through the friendly cooperation of the domestic judge, that cooperation might as well be accorded in what concerned immovables as in what concerned movables; the only reason why it should not be so accorded lay in the stringency which old opinion on private international law attributed to the real statute. Again, when a foreign judgment is clothed with an *exequatur*, it will naturally affect immovables as well as movables. But when the efficacy of a foreign bankruptcy is held to depend on its being a universal assignment, and in its turn the efficacy of a universal assignment is held to depend on the maxim *mobilia sequuntur personam*, it needs no stringency of the real statute to exclude the operation of the bankruptcy on immovables; there is nothing to give it such an operation. Hence British lawyers seem never to have so much as entertained the question whether a foreign bankruptcy can operate on immovables.

It has thus far been assumed that bankruptcy takes place in the personal forum of the debtor, determined by his domicile or political nationality as the case may be. And this is firmly grounded as the general rule, for if we start from the notion of a body of creditors obtaining a common judgment in their favour, we are led by that notion to the forum which alone is common to all the creditors, and if we start from the maxim *mobilia sequuntur personam*, no definite result is given by that maxim unless the person is supposed to be in some definite place, which can only be his own proper forum. But it will not have escaped the reader that the German law provides also for bankruptcies founded on the existence within the jurisdiction of an establishment at which trade is immediately carried on, or of a property—mine, forest, farm, &c.—worked by the debtor; and this class of bankruptcies, which may be generalized as being founded on the existence of a house of business within the jurisdiction, must now be considered. When the house of business has a legal personality, as a company, incorporated or other, or as a

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firm, where the law allows such personality to a firm, there seems to be no difficulty about admitting its bankruptcy in the jurisdiction from the law of which it derives such personality. There, in virtue of its personality, is the common forum for its creditors; there it must be deemed to be, in order that the maxim *mobilia sequuntur personam* may be applied to it; there, if its bankruptcy should make its dissolution expedient, is the only power that can withdraw its personality. The domicile of a corporation is often spoken of, but domicile, where it has not been suppressed in favour of political nationality, is nothing else than personal forum. The domicile therefore of that which has only a legal personality is either a bad metaphor, or it is the jurisdiction from the law of which the personality is derived: in that way alone is the term based on any real analogy. But what if the house of business has no legal personality, being for example carried on in his own name by a debtor domiciled elsewhere, or being a branch of some concern of which the principal establishment is elsewhere, or being even the principal or only establishment for business of a company which derives its legal personality from the law of another territory? The case last put will not seem strong to any one who thinks of the number of companies incorporated in England for the sole purpose of carrying on business abroad. There is a considerable tendency, though whether a preponderant one is as yet doubtful, towards allowing a bankruptcy wherever there is either a principal establishment or a branch as distinguished from an agency; that is towards allowing a *concursus* of creditors against a man, a firm, or a company, not only where he or it is domiciled, but also wherever he or it has a centre from which business emanates. This may be convenient for the creditors connected with such business, and injustice may be avoided by admitting all creditors to prove on an equal footing. Of course a bankruptcy out of its domicile cannot end in the dissolution of an incorporated or other legally personal company.

We have seen how far the new German law goes in admitting bankruptcies not founded on the general personal forum. In France companies having foreign legal personality are continually declared bankrupt, as in the cases of the *Crédit Foncier Suisse*, having its

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principal establishment in France, *tribunal of commerce of the Seine*, 5 March 1874; a Belgian company for carrying on a foundry in France, *court of appeal of Nancy*, 8 May 1875, the court at the same time refusing to grant an *exequatur* to a Belgian adjudication of bankruptcy against the same company; and a Spanish company for making railways in Spain, which had an office and a committee at Paris and had negotiated loans there, *court of appeal of Paris*, 17 July 1877. And where Hoffmann, a London merchant with branch houses at Hamburg, Milan, and Paris, had been adjudicated bankrupt in England, he was declared bankrupt in France in spite of the opposition of the English trustee, who demanded in vain an *exequatur* for the English adjudication; *court of appeal of Paris*, 7 March 1878. But in the case of the same debtor the *court of appeal of Milan*, 15 December 1876, declared that it did not hesitate to adopt the principle of the universality of the bankruptcy in the domicile, and at the instance of the English trustee deprived a creditor of the fruits of an execution in Italy: see above, p. 141. The most interesting of these cases is perhaps that of the *Crédit Foncier Suisse*, the French decision in which was strongly grounded in the Franco-Swiss treaty of 1869, which provided that the bankruptcy of a Frenchman having his commercial establishment in Switzerland might be declared by the tribunal of his residence in Switzerland, and *vice versa*. The company had been declared bankrupt at Geneva, its domicile, two days earlier than at Paris; and this was upheld by the *Court of appeal of the Canton of Geneva*, but finally reversed by the *Swiss federal council*, 21 January 1875, on the ground that the treaty had the unity of bankruptcy for its object, and that therefore, though both bankruptcies were lawful under it, only the one in the country where the company had the principal focus of its operations ought to be maintained. The council added: "but that bankruptcy will recognize the competence of the Genevese tribunals for all the actions founded on engagements contracted at Geneva by the said Crédit Foncier Suisse." M. Charles Brocher, president of the court of cassation of Geneva, considered the decision arrived at by the federal council to have been equitable and convenient, but not legal: *Journal du Droit*

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International Privé, t. 2, p. 463. It must therefore be borne in mind that the liberal principles which have been noticed as being applied in France to foreign bankruptcies are there applied only when there is no concurrent French bankruptcy, and that the nationality or domicile of the debtor or company will not prevent the institution of a concurrent French bankruptcy.

The question of concurrent bankruptcies was much discussed by the old writers. Some local statutes provided for bankruptcies not founded on domicile, and there were not wanting those who defended them on the grounds that credit was not given to the person of a foreign merchant so much as to his property, and that the strict rules of jurisdiction ought to be relaxed in favour of commerce. From the former argument some even concluded that preference should be given against the local assets to the creditors whose debts had been contracted in the locality. The reader may refer for the controversy to tit. 2, part 1, c. 5, s. 16 of Rodenburg's treatise *De jure quod oritur e statutorum diversitate*. That author, agreeing with Burgundus, decides in favour of the unity of bankruptcy even when the debtor has equal houses of business in different places, unless he is also domiciled at each—see above, pp. 130, 131, as to equality of domiciles—in any other case the order of priority of the creditors should be decided by the law of the domicile, and executions elsewhere should not be allowed. It may be observed that any one who admits the possibility of a bankruptcy not founded on domicile cannot logically appeal to the maxim *mobilia sequuntur personam* in support of the title of foreign trustees appointed in the domicile, even where there is no domestic bankruptcy; but he will not be precluded from supporting that title, in the absence of a domestic bankruptcy, on the ground of the respect due to foreign judgments, the domicile being at least a competent forum for adjudication, if not the only one competent. We will now pass to the English doctrines.

§ 127. A debtor may be adjudicated bankrupt in England in proceedings commenced either by a creditor's petition or by his own. "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . . the debtor is domiciled in England,

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or within a year before the date of the presentation of the petition has ordinarily resided or had a dwellinghouse or place of business in England:" Bankruptcy act 1883, s. 6 (*d*). A creditor's petition must be grounded on some act of bankruptcy committed by the debtor. The acts which fall within that category are enumerated in s. 4 of the statute, and many of them may be committed out of England, while with regard to all such as may be so committed no distinction is made between their being committed within the British empire or in any other part of the world.

If the debtor's English domicile is relied on and is disputed, the burden of proving it lies on the petitioning creditor: *re Barne*, 1886, 16 Q. B. D. 522; Esher, Lindley, Lopes. Rooms may be a dwellinghouse within this enactment: *re Hecquard*, 1889, 24 Q. B. D. 71; Esher, Lindley, Lopes.

It will be observed that the wording quoted from the act is negative: "a creditor shall not be entitled . . . . unless, &c." Is it to be understood that a creditor will be entitled to present a bankruptcy petition in every case in which the debtor is either domiciled in England or within a year has ordinarily resided or had a dwellinghouse or place of business in England? Expressions are used, both in *Exp. Crispin*, 1873, L. R., 8 Ch. Ap. 374, and in *Exp. Blain*, 1879, 12 Ch. D. 522, which might be quoted in support of the assertion that no one not domiciled in England can be adjudicated bankrupt on an act of bankruptcy not committed in England; but Sir G. Mellish, delivering the opinion of himself and Lord Selborne in the former case, also used the following more cautious language, in which the italics are mine: "We are of opinion that a foreigner not domiciled in England *and not carrying on trade in England*, who quits England without having committed an act of bankruptcy, cannot be made a bankrupt upon an alleged act of bankruptcy committed out of England:" L. R., 8 Ch. Ap., pp. 379, 380. It seems difficult to say that a person's having an ordinary residence or a place of business within the jurisdiction is not a fair ground for distributing among his creditors all property of his which can be found within the jurisdiction, on the occurrence anywhere, within a reasonable time, as a year, of one of those circumstances which are deemed in other cases to give fitting occasion

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for such distribution. Supposing that subjection to the jurisdiction on the ground of domicile is wanting, there is not wanting the element of voluntary submission to it, in circumstances which may lead those who give credit to the foreigner to expect an equitable application of his means to their payment after no excessive delay on their part. The better opinion therefore probably is that the words quoted from s. 6 of the Bankruptcy act 1883 should be read positively as well as negatively, so as to give the creditor a right to present a petition in the cases mentioned in them, wherever the act of bankruptcy was committed.

See *re Hecquard*, quoted on page 147, the report of which however does not show where the act of bankruptcy was committed.

§ 128. By s. 8 of the statute the presentation of a bankruptcy petition by a debtor is itself an act of bankruptcy; but the statute contains no definition of the debtor who may present such a petition. Probably the conditions which in the last § have been quoted from s. 6 will be held to apply to this case also. As conditions for the commencement of proceedings by a creditor, they express the legislator's view of the debtors who ought to be subject to bankruptcy in England in the interest of creditors; and it would be difficult to show that a debtor who is neither domiciled in this country, nor within the past year has ordinarily resided or had a dwellinghouse or place of business in it, has any claim on his own account to what may be the benefit of an English bankruptcy. In previous stages through which the English bankrupt laws have passed it has been possible for debtors who have not fallen within the above conditions to be adjudicated bankrupt, but it may fairly be presumed that if in 1883 parliament had intended the continuance of any such possibility, it would have enabled a creditor to avail himself of it.

§ 129. When the petitioner is a creditor, it is immaterial where his debt was contracted, and whether he is domiciled, resides or trades in England; and in any case it is immaterial whether the debtor is subject to bankruptcy by the law of his domicile, if that is not in England, and whether he is in England when the petition is presented.

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The following note of cases may be read in connection with §§ 127—129.

The ancient cases take a distinction between trading in and trading to England. One who had a house of business in England, or who was in the habit of trading personally there, though only on short visits to the country, was said to trade in England; but one whose house of business was abroad, and who merely sent goods to England for sale and purchased goods there through an agent or by correspondence, was said to trade to England. At that time only traders were subject to the English bankrupt laws, and the act of bankruptcy could only be committed in England; and the result of the decisions was that any one who traded either in or to England could be made bankrupt. *Dodsworth* v. *Anderson*, 1681, T. Jones 141, king's bench, personal trading in England on short visits: *Bird* v. *Sedgwick*, 1693, 1 Sal. 110, king's bench, trading to England: *Exp. Smith*, 1737, cited from P. C. Webb's notes in *Alexander* v. *Vaughan*, Cowp. 399 &c. The last was also a case of trading to England, and lord Hardwicke appears to have decided it reluctantly on the authority of *Bird* v. *Sedgwick*, saying "if the act of bankruptcy had been committed abroad, to be sure no commission ought to go against him for that act." The wording of this is strange, and probably due to the reporter, for at that time no commission of bankruptcy could go against any one for an act committed abroad; but the meaning clearly is that it was only by reason of the commission of the act of bankruptcy in England that the debtor who traded to England was subject to the bankrupt laws. *Exp. Williamson*, 1751, 2 Ves. Sen. 249, 1 Atk. 82, is another case of the bankruptcy of one who had traded to England, before the same judge. The trader, as also in *Dodsworth* v. *Anderson*, was domiciled in Ireland, where there were then no bankrupt laws, so that these cases established the immateriality of the debtor's being subject to bankruptcy process by the law of his domicile. In the report in Atkyns lord Hardwicke is made to mention, as an element, the debtor's having carried on a trade in a kingdom belonging to the crown of Great Britain; but in the report in Vesey he is more correctly made to say, "where a man residing in one part of the realm or in other countries contracts debts here." In fact the debtor in *Bird* v. *Sedgwick* resided in Portugal. By "contracting debts here" it was only meant to refer to the debtor's trading to England, not to limit the benefit of the English bankrupt laws, when his subjection to them was established, to creditors whose debts were contracted in England. All these cases were reviewed and recognized by Lord Mansfield in *Alexander* v. *Vaughan*, 1776, Cowp. 398. In *Allen* v. *Cannon*, 1821, 4 B. & A. 418, Abbott and (?), it was decided that the habit of purchasing goods while on short visits in England was sufficient to constitute trading in England, without ever selling there.

After the cases above cited the English bankrupt laws were extended to non-traders, with some distinction between the things which were acts of bankruptcy when done by traders and those which were such when done by non-traders; and certain things done abroad were made acts of bankruptcy, but none of them were among those which were such acts only when done by traders. In this state of the law it was decided, in accordance with the principles expressed by lord Hardwicke in *exp. Smith*, that no one who was neither domiciled in England nor traded personally in England could be made

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bankrupt on anything done by him abroad; also that any person whatever might be made bankrupt on a non-trader's act of bankruptcy committed by him in England: *Exp. Crispin*, 1873, L. R., 8 Ch. Ap. 374, Mellish and Selborne, see above, p. 147. In the same state of the law *Exp. Pascal*, 1876, 1 Ch. D. 509, James, Mellish and Baggallay, showed that a debtor's summons might be served in England on any one however transiently there, as a foundation for an act of bankruptcy; while that it could not be served out of England was shown by *Exp. O'Loghlen*, 1871, L. R., 6 Ch. Ap. 406, James and Mellish.

The following cases are still applicable. The same circumstances which in the case of one resident in England, or having a house of business there, would lead to the conclusion that he had committed an act of bankruptcy by departing from that country or remaining out of it with intent to defeat or delay his creditors, may not lead to that conclusion in the case of any other person: *Exp. Crispin*, as above; *Exp. Gutierrez*, 1879, 11 Ch. D. 298, Jessel, James and Bramwell; *Exp. Brandon*, 1884, 25 Ch. D. 500, Selborne, Cotton and Fry.

Exp. Crispin further shows the immateriality of the debtor's being in England when the petition for adjudication is presented; and the immateriality of the place where the petitioning creditor's debt was contracted is shown by *Exp. Pascal*, as above.

A partner in a house of business in England, who is domiciled abroad and does not personally buy or sell in England, cannot be adjudicated bankrupt on a levy of execution by seizure and sale of the goods of the firm in England: *Exp. Blain*, 1879, 12 Ch. D. 522, James, Brett and Cotton. The point of this case is that an act of bankruptcy is a personal act or default, and cannot be committed through an agent, or by a firm as such. As to certain expressions in it, see above, p. 147.

§ 180. That bankruptcy proceedings against the same debtor are pending in another country is not a conclusive reason against making an adjudication in England. The English court will adjudicate if it appears that to do so either is or may be for the interest of the creditors; but even after adjudication the proceedings may be stayed if it appears that they are useless, as for instance because all the assets are abroad and in course of distribution by a foreign court.

Adjudication granted on a petition which would overreach a prior Irish adjudication, and might therefore bring in more assets: *re McCulloch*, 1880, 14 Ch. D. 716; Bacon, affirmed by James, Cotton and Thesiger. Adjudication refused where there was a pending sequestration in Scotland, and no debts contracted since its commencement, nor any assets in England: *re Robinson*, 1883, 22 Ch. D. 816; Jessel, Baggallay, Lindley. As to staying the English proceedings, see what was said by James, in *exp. Pascal*, 1876, 1 Ch. D. 512, and in *re McCulloch*, u.s., p. 723.

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§ 131. A company which is domiciled in England—that is to say, which derives its incorporation or other legal existence from the law of England, or from British law as connected with England rather than with any other part of the empire—is subject to be wound up in England wherever its business may be; and if all its business is abroad, that is only an additional reason for winding it up.

Re Madrid and Valencia Railway Company, 1849, 3 De G. & S. 127, Knight-Bruce; affirmed by Cottenham, 1850, 2 M. & G. 169: *re Factage Parisien Limited*, 1864, 34 L. J., N. S., Ch. 140, Romilly: *re Peruvian Railways Company Limited*, 1867, L. R., 2 Ch. Ap. 617, Cairns and Turner affirming Malins: *re General Company for the Promotion of Land Credit Limited*, 1870, L. R., 5 Ch. Ap. 363, Giffard; affirmed *sub nom. Reuss* v. *Bos*, 1871, L. R., 5 E. & I. A. 176, Hatherley, Colonsay, Cairns. The last case is the authority for the latter part of the §. Giffard and Hatherley appear to have considered that no business carried on abroad could be taken into account under the provision in the companies act 1862, that a company may be wound up by the court when it "does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year;" and Cairns considered that whether this was so or not, a company which only carried on business abroad was one which it was "just and equitable should be wound up," within the spirit of the same act. Malins in this case had refused to make an order for winding up, as a matter of discretion. The business of the *General Company for the Promotion of Land Credit* had not been carried on in the United Kingdom; but had it been necessary to define the point, I presume that business in Scotland or Ireland would have satisfied the companies act 1862, and have prevented the doctrine of the latter part of this § applying: see what was said by Jessel, *alio intuitu*, in *re International Pulp and Paper Company*, 1876, 3 Ch. D. 594.

§ 132. A company which in the sense of § 131 is domiciled out of the United Kingdom may be subjected to winding up proceedings in England if it has an office there, though of course those proceedings cannot be carried so far as to dissolve the company.

Re Commercial Bank of India, 1868, L. R., 6 Eq. 517, Romilly; *re Matheson Brothers Limited*, 1884, 27 Ch. D. 225, Kay; *re Commercial Bank of South Australia*, 1886, 33 Ch. D. 174, Pearson and North. The second and third cases show that the pending of winding up proceedings in the company's domicile is no objection to an ancillary winding up here.

If the company were incorporated by registration in Scotland or Ireland, the companies act 1862 would make such respective part of the United Kingdom the forum for winding it up.

§ 133. A winding up order cannot be made in England against a

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company domiciled abroad in the sense of § 131 if it has no office in England, though it carries on business there by means of agents.

Re Lloyd Generale Italiano, 1885, 29 Ch. D. 219, Pearson. It was not necessary to consider this point in *re Union Bank of Calcutta*, 1850, 3 De G. & S. 253, Knight-Bruce, the winding up order there being refused as a matter of discretion.

§ 134. Curators, syndics, or others who under the law of a country where a debtor is domiciled are entitled to administer his property on behalf of his creditors, are entitled as such to his chattels personal and choses in action in England.

Solomons v. *Ross*, 1764, 1 H. Bl. 131 note, justice Bathurst sitting for lord chancellor Northington; *Jollet* v. *Deponthieu*, 1769, 1 H. Bl. 132 note, Camden. In *Neal* v. *Cottingham*, 1764, 1 H. Bl. 132 note, Bowes, lord chancellor of Ireland, made a corresponding decision in favour of English assignees, with the approval of several of the Irish judges. In all these cases the title of the curators or assignees came into conflict with that of an attaching creditor, judgment in the attachment suit not having been signed till after their appointment. During the argument in *Folliott* v. *Ogden*, 1 H. Bl. 132, lord Loughborough said that he was counsel in *Solomons* v. *Ross*, "which was decided solely on the principle that the assignment of the bankrupts' effects to the curators of desolate estates in Holland was an assignment for a valuable consideration."

In *Alivon* v. *Furnival*, 1834, 1 Cr. M. & R. 277, 4 Tyr. 751, Parke and (?), which was an action by French syndics for a debt due to their bankrupt, the title of the plaintiffs as mandatories without an assignment was recognized; and although three had been appointed two were allowed to recover, on proof that they could sue in France without the third.

The first English case in which the necessity of domicile as a foundation for the foreign title seems to have been considered is *re Blithman*, 1866, L. R., 2 Eq. 23, a contest between the assignee in a colonial insolvency and the executrix of the insolvent, where Romilly held that the title of the former depended on whether the insolvent was domiciled in the colony. But in a similar contest, *re Davidson*, 1873, L. R., 15 Eq. 383, James decided in favour of the assignee whatever might have been the domicile, because the debtor had been declared insolvent on his own petition.

The Scotch authorities had fluctuated with regard to the doctrine of § 134, but the superior title of the assignees in the English bankruptcy of a person domiciled in England, to that conferred by an arrestment in Scotland not completed by decreet before the assignment to them, was established by the court of session in *Strother* v. *Read*, 1803, 13 Fac. De. 253. This was followed by *Royal Bank of Scotland* v. *Cuthbert*, or v. *Stein's assignees*, 1813, 17 Fac. De. 72, 1 Rose 462, in which the same court held that the bankruptcy in England of four partners having as such houses of business both in England and in Scotland, but of whom two were domiciled in England and two in Scotland, passed the movable estate of all in Scotland, so as to preclude a

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subsequent sequestration in the latter country from having any operation not only on the joint estate of the four, but even on the separate estate of the two whose domicile was Scotch, and who carried on a separate business in Scotland. Afterwards the house of lords in a Scotch appeal; *Selkrig* v. *Davis*, 1814, 2 Rose 291, 2 Dow 230, Eldon; similarly held that an English bankruptcy was paramount to a subsequent Scotch sequestration, where the bankrupt was domiciled in Scotland but traded both in England and in Scotland. It is unfortunately difficult to discover the precise ground for the decision in *Selkrig* v. *Davis*, or for that part of the decision in *Royal Bank of Scotland* v. *Cuthbert* with which *Selkrig* v. *Davis* corresponded. It can hardly be doubted that in some way or other the ground was the imperial character of the legislation on which an English bankruptcy depended, and that these cases cannot be quoted as authorities for allowing Scotch movables, or therefore English, to pass by a bankruptcy taking place neither in the United Kingdom nor in the debtor's domicile. But since at that time it was agreed that the English bankrupt laws did not design to pass Scotch immovable property, their design to pass Scotch movables could not be inferred from their power to do so; and if it was presumed that they designed to follow the maxim *mobilia sequuntur personam*, that argument would not apply where the domicile was not English. Probably, if a precise reason had been pressed for, it would have been said that bankruptcy in the domicile certainly passed foreign movables, and that when parliament gave a remedy by bankruptcy in other cases it must have intended to equiparate those cases to that of domicile. For the rest, from *Selkrig* v. *Davis* and *Strother* v. *Read* it further appears that the intimation of the assignment to the debtor, which by Scotch law is generally necessary in order to complete an assignee's title to a debt, is not required in Scotland from persons deriving title to a debt under a foreign bankruptcy.

Where the order of dates was this: 1. act of bankruptcy, to which the English commission related; 2. application for sequestration, to which the Scotch award related; 3. English commission (now it would be adjudication) of bankruptcy; 4. Scotch award of sequestration: it was held by the house of lords on a Scotch appeal that the sequestration was prior. *Geddes* v. *Mowat*, 1824, 1 Gl. & J. 414, Gifford.

§ 135. But where a particular form of conveyance is necessary, as in the case of money in the public funds, or in that of a legal chose in action only assignable pursuant to the judicature act 1873, s. 25, subsection 6, the foreign law under which the curators syndics or others are entitled cannot supply the want of such conveyance, though it binds the beneficial right.

A Scotch sequestration, though under a British act of parliament, did not enable the trustee to sue for a legal chose in action in his own name. *Jeffery* v. *McTaggart*, 1817, 6 M. & S. 126, Ellenborough and Abbott.

Thus also an English bankruptcy, passing immovable property in a colony where registration is necessary to complete the title, does not supersede the necessity of such registration: per Jessel in *exp. Rogers*, 1881, 16 Ch. D. 666.

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§ 136. A curator, syndic, or assignee in a foreign bankruptcy is not accountable in the English court merely because he is in England with funds of the bankruptcy in his hands; nor will the English court interfere with him unless it be shewn that his absence from the country of the bankruptcy prevents redress being had there.

Smith v. *Moffatt*, 1865, L. R., 1 Eq. 397, Wood.

See as to the parallel cases concerning foreign administrators of the estates of deceased persons, §§ 99—101, pp. 112, 113, above.

§ 137. An English bankruptcy, or the winding up of a company domiciled in England within the meaning of § 131, carries all the real or immovable property of the bankrupt or company in any part of the British dominions.

As to bankruptcy, before the repealing st. 32 & 33 Vict. c. 83, this rested on the st. 12 & 13 Vict. c. 106, s. 142. Now it rests on the generality of the terms in the Bankruptcy act 1883, s. 44—"all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge"—combined with the presumption, arising from the more express legislation now repealed, that parliament meant in this case to exercize its power of legislating for all the British dominions.

As to winding up, the companies act 1862 does not divest the company of the property in any of its assets, but impresses the whole of its assets with a trust for application in a course of winding up according to the act. See above, p. 142, and what is said under the next §.

See *exp. Rogers*, quoted above under § 135.

§ 138. An English bankruptcy, or the winding up of a company domiciled in England within the meaning of § 131, carries all the personal or movable property of the bankrupt or company situate or recoverable in any part of the British dominions.

This also, as to bankruptcy, rests on the generality as well of the terms in previous acts of parliament as of those quoted under the last § from the Bankruptcy act 1883, s. 44, combined with some

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presumption as to their design for the discussion of which the reader is referred to the remarks on *Selkrig* v. *Davis* and *Royal Bank of Scotland* v. *Cuthbert*, under § 134. Of course also, whatever may have been the original design of the English bankrupt laws, the inference that they are now intended to have the effect here assigned to them, whether the bankrupt be domiciled in England or not, is strengthened by their reenactment since the decision of those cases without substantial variation in this respect.

I place under this §, if it needs any support beyond the common operation of English law within England, the case of *exp. Robertson*, 1875, L. R., 20 Eq. 733, Bacon, in which a creditor domiciled in Scotland was ordered to pay over to the trustees in an English liquidation a sum which after its commencement he had received from the liquidating debtor on account. The judge put it on the ground of the creditor's having proved for the residue of his debt, treating proof as a contract that the whole estate should be administered in the liquidation or bankruptcy, which we shall presently see it is not held to be so far as regards non-British immovables, though there can be no ground for excepting immovables if the liability be not founded on law but on contract. There was some difficulty about the creditor's being subject to the process of the court, but as soon as that was got over the case scarcely needed the application even of this §, for the payment had been made on a cheque presented in England.

In *exp. Scinde Railway Company*, 1874, L. R., 9 Ch. Ap. 557, James and Mellish affirming Malins, and *re International Pulp and Paper Company*, 1876, 3 Ch. D. 594, Jessel, creditors of a company in course of winding up in England were restrained, in the former case from attaching its property in India, and in the latter from suing the company in Ireland. In each instance the company was domiciled in England within the meaning of § 131. If an Indian or Colonial company were subjected to a winding up process in England under the doctrine of § 132, it is difficult to suppose that either its movable or its immovable property situate out of England could be strictly considered as passing by such winding up, though it might very likely, for convenience, be administered in the English court as long as there was not a concurrent winding up in the company's domicile.

§ 139. But when a debtor to one who is a bankrupt in England has paid his debt since the commencement of the bankruptcy under process of law in any country, British or foreign, the trustees in the bankruptcy cannot make him pay it over again, though the creditor who compelled the payment by process of attachment may be accountable for it to the trustees.

Le Chevalier v. *Lynch*, 1779, 1 Doug. 170, Mansfield.

§ 140. One who is a bankrupt in England cannot be compelled to

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make to the trustees an assignment of his immovable property outside the British dominions, or even of his movable property situate or recoverable in any country in which the title of the trustees to such property is not as fully recognized as in England.

Exp. Blakes, 1787, Cox 398, Thurlow, foreign debts: Eldon, in *Selkrig* v. *Davis*, 1814, 2 Rose 311, 2 Dow 245, property both immovable and movable. And it would be improper to compel the bankrupt indirectly, by withholding his certificate till he had conveyed his foreign immovables: Parke, in *Cockerell* v. *Dickens*, 1840, 3 Mo. P. C. 133.

But now let us suppose that a creditor of one who is a bankrupt in England has since the commencement of the bankruptcy obtained payment outside the British dominions, either out of immovable property, or out of movable property the title of the English trustees to which was either not put forward or was not recognized in the country where it was situate or recoverable. The best introduction to the doctrine applicable to such cases will be found in the following quotation from the judgment of the privy council on an appeal from Calcutta with reference to an Indian insolvency, which was confessedly governed by the same principles as an English bankruptcy, both on general grounds of private international law and because the Indian system of insolvency was established by an act of the imperial British parliament. "If the real estate in Java did not pass by the assignment under 9 Geo. 4, c. 78, s. 9"—the act for Indian insolvencies—"nor could in any way be got hold of and made available by the assignees for the payment of the general creditors, any individual creditor who could obtain it by due course of law would have a right to hold it; and if he duly proved the debt due to him before he had been paid any part of the debt so proved by means of that estate, he would be entitled to receive the dividends under the insolvent estate until he had been paid altogether twenty shillings in the pound, exactly in the same way as if a creditor had had a security on the real estate or personal credit of a third person. In this case he could neither be compelled to refund the money obtained by means of the real estate or the dividends received on the debt, or be restrained from receiving those hereafter to become due. The principle is that one creditor shall not take a part of the

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fund which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come in *pari passu* with the other creditors for satisfaction out of the remainder of that fund: and this principle does not apply where that creditor obtains by his diligence something which did not and could not form a part of that fund." *Cockerell* v. *Dickens*, 1840, 3 Mo. P. C. 132. This extract fully sets out the doctrine relating to a fund which even if not taken by the particular creditor would not have been available for the creditors generally, but it was not necessary to state as fully the doctrine relating to a fund which might have been so available. The particular creditors were aliens resident out of the jurisdiction. They had not only obtained partial payment out of the insolvent's real estate in Java, but had also commenced proceedings, though they had not so far derived any fruits therefrom, against debtors to the insolvents at Bencoolen, another settlement in the Dutch East Indies. The assignees at Calcutta, in accordance with what is said in the passage extracted, succeeded in stopping their dividends in the insolvency there until they should abandon the proceedings at Bencoolen; but had the particular creditors been subject to the jurisdiction, and obtained fruits from the proceedings at Bencoolen, the question would have arisen whether the assignees might not have asked to have those fruits paid over, as forming part of the fund which might have been available for the general mass, and which therefore creditors who were themselves subject to the law governing the insolvency ought not to keep out of that mass. We have now to develop the doctrine thus introduced.

§ 141. Any creditor, British or alien, may retain any payment which he can obtain out of the non-British immovables of the bankrupt, and if it is only partial may receive dividends in the bankruptcy on the residue of his debt *pari passu* with the other creditors.

Cockerell v. *Dickens*, 1840, 3 Mo. P. C. 98, Parke.

The doctrine is thus broadly stated in the English authorities, on the assumption that a foreign bankruptcy would in no country be allowed to operate on immovables: but since this is not quite the

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fact, the principle laid down in *Cockerell* v. *Dickens* should lead to the proposition being restricted to payment obtained out of immovables situate in countries where the English trustees would be unable to get the benefit of them.

Coming to the case of movables, let us suppose a country, not where the title to them of the trustees in an English bankruptcy is absolutely unrecognized, for there is perhaps no such country, but where it is postponed to that conferred by an execution or attachment subsequent to the bankruptcy. If a creditor obtains payment by such an execution or attachment, it may be said that he has taken a part of the fund which otherwise would have been available for the payment of all the creditors, because, if no one had intervened, the trustees could have successfully asserted their title to the movables against that of the bankrupt. It may be answered that other creditors might have intervened, whom the process of the English court could not have reached, and that therefore, if a creditor amenable to the jurisdiction is not allowed to retain the fruits of the pains which he may take in the country supposed, the movables in that country will be enjoyed by those creditors only who are not amenable to the jurisdiction. The sufficiency of the answer might depend on the existence and importance of creditors of the latter class in the particular instance, but the courts have not embarked in such an enquiry, and have rather proceeded on lines which may probably be described as in the next two §§.

§ 142. A British creditor, or one domiciled in England, or one who in his character of creditor must be regarded as English because the debt is owed to a house of business in England of which he is a member, and who after the commencement of an English bankruptcy, and not by virtue of any charge prior to the bankruptcy, obtains payment out of the bankrupt's movables in a non-British country, must pay over the amount to the trustees in the bankruptcy, whether or not he seeks to receive dividends on the residue if any of his debt, whether or not the payment was obtained by legal proceedings, and whether or not the title of the trustees was asserted in such proceedings if any.

§ 143. A creditor not being such as is described in the last §, who

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after the commencement of an English bankruptcy, and not by virtue of any charge prior to the bankruptcy, obtains payment out of the bankrupt's movables in a non-British country, must account for such payment if he seeks to receive dividends on the residue if any of his debt, but may otherwise retain it; and this, whether or not the payment was obtained by legal proceedings, and whether or not the title of the trustees was asserted in such proceedings if any.

The leading cases are *Hunter* v. *Potts*, 1791, 4 T. R. 182, king's bench, judgment of court delivered by Kenyon; *Sill* v. *Worswick*, 1791, 1 H. Bl. 665, common pleas, judgment of Court delivered by Loughborough; and *Philips* v. *Hunter*, 1795, 2 H. Bl. 402, exchequer chamber, Macdonald, Hotham, Perryn, Heath, Thompson and Rooke, against Eyre; in all which the assignees in English bankruptcies recovered from creditors the amounts which they had obtained by attachments abroad. In *Hunter* v. *Potts*, where the attachment was in Rhode Island, and the assignees had not intervened nor was it proved how their title would have been regarded by the law of that state, lord Kenyon adverted to the residence of the creditor in England and his knowledge of the bankruptcy at the time when he commenced the attachment suit, but mainly rested the judgment on the English domicile of the bankrupts. In *Sill* v. *Worswick* the attachment was in the British West Indies, so that the title of the assignees must have been regarded as superior had they intervened, and the case might have been put on the proposition expressed in § 138. In fact lord Loughborough considered the English residence of the creditor, and his swearing in England, with knowledge of the bankruptcy, the affidavit by which the attachment suit was commenced, to be sufficient alone to decide the case. He went however more widely into the doctrine than he considered the circumstances to require, and after laying great stress on the bankrupt's domicile he continued: "I do not wish to have it understood that it follows as a consequence from the opinion I am now giving, I rather think that the contrary would be the consequence of the reasoning I am now using, that a creditor in that country"—not the colony but a supposed non-British country—"not subject to the bankruptcy laws nor affected by them, obtaining payment of his debt and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable. But if the law of that country preferred him to the assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided." In *Philips* v. *Hunter* the attachment was made in Pennsylvania, and the assignees had not intervened, nor was it proved how their title would have been regarded. The majority of the court adverted in their judgments to the attaching creditor's being a British subject though resident in America, and being a partner in a firm whose only house of business was in England, where also the other partners were resident, and where the debt of the bankrupts to the firm was contracted; and they regarded all these circumstances as important. The pith of their opinions is contained in

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the following sentences. "When the debt therefore was contracted, all the parties were as much subject to the bankrupt laws as to the other laws of England under which they lived . . . . . and it is on wise principles that sovereign states acknowledge and act according to the different civil relations which subsist between men in their own country." I have ventured in framing the §§ to disregard the place of contracting the bankrupt's debt, and the state of circumstances at the time of contracting it, for those, according to settled maxims of private international law, might affect the substance of an obligation but not the remedy for its breach.

Lord Hardwicke had already held that the assignees in an English bankruptcy had a superior title to that gained by arrestment in Scotland after the bankruptcy, a proposition which may be referred to § 138 : *McIntosh* v. *Ogilvie*, 1748, 4 T. R. 193 note, where he prevented a creditor by a *ne exeat* from going to Scotland in order to make such arrestments ; and *Captain Wilson's Case*, another stage in which is reported *sub nom. Richardson* v. *Bradshaw*, 1752, 1 Atk. 128, but in which lord Loughborough's account in *Sill* v. *Worswick*, 1 H. Bl. 692, shows that both lord Hardwicke and the court of session held the assignment to be a superior title to the arrestment. Lord Mansfield however afterwards held at *nisi prius* that a creditor resident in England could hold against the assignees in an English bankruptcy the fruits of an execution obtained by him after the bankruptcy at Gibraltar : *Waring* v. *Knight*, 1765, Cooke's Bank. Laws, 300. And the court of session fluctuated as mentioned on p. 152 : so the whole subject was at sea till the decision of the three leading cases above reviewed.

See also *Cockerell* v. *Dickens*, as stated at p. 157 with reference to the proceedings at Bencoolen ; and the next §.

In *exp. Dobree* and *exp. Le Mesurier*, 1803, 8 Ves. 82, lord Eldon allowed the hour of the day to be enquired into, for the purpose of determining the priority between an English bankruptcy and attachments in Jersey.

§ 144. Where the property of the same person, or of a partnership consisting of the same persons though under a different style, is being administered in bankruptcy both in England and abroad, a creditor who has received a dividend in the foreign bankruptcy can receive nothing in the English one until all the creditors have been made equal, notwithstanding that he may have been entitled to priority by the law of the foreign bankruptcy.

Exp. Wilson, 1872, L. R., 7 Ch. Ap. 490, James and Mellish : *exp. Banco de Portugal*, 1879, 11 Ch. D. 317 ; James, Baggallay and Bramwell ; affirmed *sub nom. Banco de Portugal* v. *Waddell*, 1880, 5 Ap. Ca. 161 ; Cairns, Selborne, Blackburn. It was said in *exp. Wilson* that this case was the same in substance as that of a creditor obtaining payment abroad by execution after the commencement of the English bankruptcy ; but an English creditor who did so would be subject to the severer rule of § 142, and it does not appear that the creditors in *exp. Wilson* were not English.

§ 145. Where a person is a bankrupt in England, and his partners

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reside abroad, whether in or out of the British dominions, and are not bankrupt, any creditor, British or alien, may retain any payment which he can obtain from the firm abroad, and if such payment is only partial may receive dividends in the bankruptcy on the residue of his debt *pari passu* with the other creditors.

Brickwood v. *Miller*, 1817, 3 Mer. 279, Grant. "Equality of distribution," the judge said, "cannot possibly be attained."

§ 146. Where one or more persons are bankrupt in England, and the property of a firm in which he or they are partners together with others is also under administration in bankruptcy abroad, whether in or out of the British dominions, the question whether a creditor who proves against the firm abroad can also prove against the partner or the smaller firm in England is to be decided according to the English rules as to double proof.

Exp. Chevalier de Mello Mattos, re Vanzeller, 1834, 1 M. & A. 345, Brougham affirming court of review: *exp. Goldsmid*, 1856, Knight-Bruce and Turner, and 1857, Turner. Knight-Bruce's difference in the latter case was as to the English rules.

§ 147. The law of the bankruptcy, that is of England, governs the mode in which the trustees in an English bankruptcy hold whatever foreign property of the bankrupt, movable or immovable, they obtain. Therefore they hold it subject to all equities against the bankrupt which are not impeachable under the bankrupt laws themselves, and if he had entered into a binding contract to give security on it there will be a good security as against the trustees, though the security has not been completed by the law of the place where the property is situate or recoverable.

Exp. Holthausen, 1874, L. R., 9 Ch. Ap. 722, James and Mellish.

§ 148. The validity of a debt being established by the *lex loci contractus* or other relevant law, the order of priority in which it ranks in bankruptcy administration depends on the law of the bankruptcy, *lex loci concursus* or *lex fori*.

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Exp. Melbourn, 1870, L. R., 6 Ch. Ap. 64, Mellish and James; *Thurburn* v. *Steward*, 1871, L. R., 3 P. C. 478, Cairns.

The English doctrines which have thus been passed in review will be found to present much similarity to those prevalent in France. In each country the title of the bankruptcy trustees of the debtor's foreign domicile may be made available as paramount to that of a particular creditor attempting to take by subsequent execution or attachment, and, in the absence of a domestic bankruptcy, as carrying the debtor's property in the respective country, though in England with an exception as to his real estate. But in each country it is a matter of daily occurrence to declare the bankruptcy of a debtor not domiciled in it, and in France the cases where this may be done are not limited by the condition that there shall be no bankruptcy pending in the domicile, though it would seem that in England such a proceeding would leave nothing but the English real estate for a subsequent English adjudication to operate on. Further from either than these systems are from each other stand on the one side the German law permitting execution notwithstanding the declaration of a foreign bankruptcy, and on the other the efforts made in Italy to maintain the unity of bankruptcy as advocated by Burgundus, Rodenburg, and Savigny. It may be found surprising that the English system should have gone as far as it has in support of the authority of the domicile in this matter, when it is remembered that in the matter of succession on death, in which the continental views were beyond all comparison more uniform in its favour, we have limited the authority of the domicile to the beneficial surplus of the personal estate, and in that part of the matter which alone resembled bankruptcy we have established separate administrations with differing priorities among the creditors of the succession. There were however two reasons: in bankruptcy the ecclesiastial courts were not present to lay hold of *bona notabilia*, and commercial convenience was present to plead in favour of unity of administration. Convenience will probably decide whether that unity should be advanced or restricted, or whether nothing should be done but to regulate it within something like the extent which it has in this country. Regulation in any case it certainly wants, and

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the extreme divergence of the existing views on the subject must convince all that neither judicial decision nor isolated legislation is likely to afford a remedy, that in fact order can only be established by international treaties and national legislation to give effect to them. If the British government should take part in the negotiation of such treaties, it will have to give its serious attention to the necessity that English law should recognize the personality of a partnership.

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CHAPTER VII.

MOVABLES.

We have now gone through marriage, death, and bankruptcy, the three principal cases in which the conception of a person's fortune, or at least of the movable portion of it, as an entirety, and necessarily therefore as connected with his person, is forced on us by circumstances. We must now consider the rights enjoyed in individual articles of property, movable or immovable, and the title to those rights. The law as to individual movables, as well as that on entire movable fortunes, has been widely considered to depend on the person of their owner, on account of a general connection supposed to exist between them and him, independent of special circumstances. It therefore forms a convenient passage between the cases we have hitherto examined and that of immovables, for which no such general connection has been asserted except by the more extreme advocates of the influence of nationality on private law, whose views however have not to this extent been followed even in the Italian code (see above, pp. 30, 31).

The general connection which has been supposed to exist between movables and their owner has been expressed in the maxims *nomina creditoris ossibus inhærent*, and *mobilia sequuntur personam*. The former, on the face of it, contemplates only debts, with regard to which, when we speak of the property in them, all that can be meant is the right of action for them, whether vested in the owner by their original creation or by their voluntary or involuntary assignment. Now such rights have always been considered to depend mainly on the *lex loci contractus*, with perhaps some modification from the *lex fori*. Therefore such a maxim as *nomina creditoris ossibus inhærent* can hardly have been intended to assert any connection between the

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species of property it deals with and the owner's person, except for the purpose of those cases which suggested dealing with his fortune as an entirety. It amounts to no more than saying that in such cases, which are those of the so-called universal assignments, debts fall under the personal and not under the real statute; and it cannot be quoted in support of any doctrine as to the law governing particular assignments of movables.

The other maxim however, *mobilia sequuntur personam*, certainly may apply, and has been intended to apply, to corporeal chattels, and to assert that the transfer of property in them, individually and not as parts of an entirety, depends on the personal law of the owner. "Some are of opinion," says Story, "that all laws which regard movables are real; but at the same time they maintain that by a fiction of law all movables are supposed to be in the place of the domicile of the owner. Others are of opinion that such laws are personal, because movables have in contemplation of law no *situs*, and are attached to the person of the owner wherever he is; and, being so adherent to his person, they are governed by the same laws which govern his person, that is, by the law of the place of his domicile" (*Conflict of Laws*, § 377). Thus two different views as to the nature of laws and the ground of their international acceptance, each being completed by its appropriate fiction, have been made to lead to the same result. That result was also arrived at by lord Loughborough in a third mode, treating the doctrine that movables follow the person not as assigning them a fictitious locality, either in the owner's domicile or in the place where he may happen to be, but as denying to them all locality. "It is a clear proposition," he said, "not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a

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subject, that will regulate the succession. For instance, if a foreigner having property in the funds here dies, that property is claimed according to the right of representation given by the law of his own country" (*Sill* v. *Worswick*, 1791, 1 H. Bl. 690). The larger part of these remarks applies to the so-called universal assignments, and the case of succession furnished a very inapt parallel for any operation of the personal law on particular assignments, since the English rules on that case, as we have seen, limit the authority of the personal law to the beneficial surplus, and are strict in requiring that title to the movable items composing the succession shall be made in accordance with the law which governs in their situation. But in spite of this, it is plain that lord Loughborough intended to assert the law of the person as the rule for the disposition of particular movables.

A rule which has been reached by such various technical roads may be supposed to be dictated in reality by some strong substantial motives. One ground on which the law of a person may claim to regulate his movable property was stated by the majority of the court in *Philips* v. *Hunter* (1795, 2 H. Bl. 406). In the summary of their reasons which is given us, after noticing the claim of the *lex situs* founded on the protection which that law affords to the rights of ownership, they are made to observe that "the country where the proprietor resides, in respect to another species of protection afforded to him and his property, has a right to regulate his conduct relating to that property. This protection, afforded to the property of a resident subject which is situated in a foreign country, is not imaginary but real. The executive power of this kingdom protects the trade of its subjects in foreign countries, facilitates the recovery of their debts, and if justice be delayed or denied the king by the intervention of his ambassadors demands and obtains redress." But the occasional protection thus afforded has only to be named, in comparison with the continual protection on which the enjoyment of property depends, to show how little it can weigh in determining the law to be applied. It is moreover a protection, not against the justice of the country to which the proprietor sends his ships or his merchandize, but against the possible failure of that justice, and therefore presupposes its course as the rule.

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Again, the doctrine that the law of the alienor should regulate the alienation of his movables appears to have been supported by a feeling thus expressed by lord Kames: "the will of a proprietor or of a creditor is a good title *jure gentium*, that ought to be effectual everywhere" (*On Equity*, b. 3, c. 8, s. 4). But lord Kames, although he thus mentions proprietors as distinct from creditors, scarcely applies his view to more than the assignment of debts. And by the *jus gentium* he meant very much what the Roman prætor meant, a selection of elements common to different national laws, so that the reason he gives does not follow the track which is followed in common by all doctrines of private international law, namely that of selecting a particular law, and not common elements out of different laws. No doubt the interests of commerce require that great freedom of disposition should be allowed to proprietors, and this consideration speaks in favour of the validity of an alienation made in the manner prescribed by the law of the alienor's domicile, but not less so in favour of the validity of one made in the manner prescribed by the law of the place of sale. Indeed, notwithstanding the frequent assertions of the *lex domicilii* as governing movables, it is the forms of the place of sale which have been most commonly employed, and on which even the jurists who assert the *lex domicilii* have practically laid the most stress. The point oftenest at issue is whether a title is fully created without delivery. On the one hand, under the Code Napoleon, art. 1138, the property is transferred by the contract of sale; and by the law of England, followed in many colonies and American states, the purchaser is only bound to take possession within a reasonable time, or, if the goods are at sea at the time of the sale, within a reasonable time after their arrival in port. If he complies with this condition, English law holds his title to be superior to that of subsequent purchasers or creditors who by greater diligence may have anticipated him in taking possession. On the other hand, the Prussian code of 1794 and that of Louisiana, with some other laws which are founded on the Roman, award the property to the one who first gains possession on a lawful title, without regarding the priority of the titles, or whether laches is imputable to the claimant who has been outstripped. Again, a mortgage, by English law, is

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usually created in the form of a transfer of property, defeasible or redeemable on payment of the debt; but in most other laws mortgage is a proceeding quite different from the transfer of property. Hence it may not only be discussed whether, in countries where delivery is necessary to complete a sale, a foreign sale can be complete without delivery, but also whether, even if that be so, a foreign mortgage can give a good title without delivery through being in the form of a sale. Now Story says that to hold delivery to be necessary on a sale of chattels, because such is the law of the place where they may happen to be, "would most materially impair the confidence which the commercial world have hitherto reposed in the universal validity of the title acquired under a bill of lading" (§ 394). But when bills of lading and dock warrants are regarded as negotiable representatives of the chattels to which they relate, the *lex situs* is not waived in favour of the *lex domicilii*, but if it is waived at all, it is so in favour of the *lex loci actus*, as governing the transfer of such instruments by indorsement or otherwise.

On the whole, the arguments which have been used in support of the maxim *mobilia sequuntur personam*, understood as regulating dealings with movables by the personal law of their owner, cannot be pronounced satisfactory: and the reader will be prepared to find that in the present century the current of authority, out of England, has set strongly towards the application of the *lex situs* to movables as well as to immovables, in all cases except those of the so-called universal assignments. How far the same may be said of the English authorities will be afterwards considered, but it will be convenient to introduce the foreign view by a quotation from Fœlix, on account of the very practical character of that writer. "We have seen," says Fœlix—*Traité du Droit International Privé*, § 62—"that the rule according to which movables are governed by the law of the domicile of the person to whom they belong rests on the intimate relation which exists between movables and the person of their owner, on a fiction of law which deems them to exist in the place of domicile of the latter. Thence it follows that that rule cannot be applied except to those circumstances or acts in which movables only appear as an accessory of the person, for example, to the case of succession

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ab intestato, to that of dispositions made by last will, or to that of such dispositions *inter vivos* as express or tacit marriage contracts. The rule does not apply to any case in which the movables have no intimate relation to the person of the owner, for example, when the property in movables is claimed and disputed, when the maxim that *en fait de meubles possession vaut titre* is invoked, when the question is about a right of pledge, a claim to preferential payment, process of execution, the inalienability of movables, their confiscation, escheat of a movable succession to the public treasury, or lastly a prohibition against exporting movables. In all these cases the law of the place where the movables are actually found must be applied, for the fiction which has been mentioned gives place to the fact (*cesse par le fait*). For example," continues Fœlix in a note, "a contract concluded abroad, by which the owner of a movable actually in France should grant a right of pledge over it (art. 2073 and following ones of the *Code civil*), would have no effect in France if the pledge had not been delivered to the creditor (art. 2076), although this condition might not be required by the law of the owner's domicile." In this quotation the distinction is plainly drawn between the cases in which a man's property is considered as an entirety, grouped round his person as a centre, and those in which the articles which compose it are separately considered.

The doctrine of Savigny is similar. After stating that "the capacity of a thing to become subject to private property is to be judged by the law of the place at which the thing is situated," and that "the same rule applies as to the admissibility or restriction of the acquisition by occupation of property in things of many kinds," of which he gives as an example "laws as to the royalty on amber and on many kinds of minerals," he proceeds thus. "In the forms of alienation—i.e. of the voluntary transmission of property to another person—very different rules of law occur; and on the principle above considered we must apply the rule of law in force at the place where the thing is situated, without regard to the domicile of the one or of the other person, and without regard to the place where the contract is entered into. Thus, in Roman law, alienation depends on the delivery of the thing; in the Prussian law likewise on delivery. In

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the French law, on the contrary, the transference of the property is effected by the mere contract. . . . . If a Parisian sells his furniture situated in Berlin to a Parisian in Paris, the property is transferred only by tradition; but if, conversely, a Berliner sells his goods situated in Paris to a Berliner in Berlin, the mere contract transfers the property. . . . . It will suffice to bring this rule into operation if the continuance of the things at a place should be only transient and very short; for in every case the transference of the property depends on a momentary act, and therefore fills no long space of time. It will be different in the exceptional cases in which the present situation of the things is so indeterminate that the persons acting cannot be held to have any certain knowledge of it. In such cases we shall have to regard as the place where the thing is situated that at which it is destined first to remain, which will often be the domicile of the present owner, the seller. . . . . The acquisition of property by prescription is essentially different from the acquisition by tradition, in being effected not by a momentary fact but by one extending over a longer period of time. In regard to immovable things, the application of the law of the place where the thing is situated is quite undisputed. On the contrary, opinions are very much divided in respect to the prescription of movables. But here the question is specially important, because the laws of different countries vary exceedingly. The Roman law requires possession for three years, the Prussian for ten. The French requires no continued possession, but excludes with the very beginning of it the vindication of the former owner,* with an exception in the case of lost and stolen things, the protection of which however ceases with the expiry of three years. By this last rule the French law, in its practical results, approximates to the Roman. It is here precisely that the application of the *lex rei sitæ* appears especially certain, from the circumstance that the foundation of all prescription is continuing possession; but possession, as being essentially a relation of facts, is, with even less doubt than any real right, to be judged by the *lex rei sitæ*. A question may still arise where the situation of the movable things, during the period of prescription, has been

* En fait de meubles, la possession vaut titre. Cod. Nap., Art. 2279.

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within different territories. There can be no doubt that all these periods of possession must be added together. The term of the prescription however, and the complete acquisition of the property, must be judged by the law of the place at which the thing is last found, because it is only at the expiry of the whole period that the change of property takes place; before, it has only been in preparation. When property has been acquired by prescription according to this law, it must be recognized in every other country, although the law of that country should require a longer period." *

The doctrine of Fœlix and Savigny is also that of both the supreme and the state courts in the United States, as appears from their decisions mentioned by Wharton (*Conflict of Laws*, 1872), who sums up thus. "We may therefore hold it to be law in the United States that an assignment made in one state of personal property situated in another, such property not being in transit or following the owner's person, passes no title to such property as against attaching creditors of the assignor, such creditors being domiciled in the latter state, when such assignment is invalid by its laws:" § 353. The exception of property in transit or following the owner's person is not to be found in the cases cited by Wharton, but has been introduced by him in imitation of the exception which we have seen admitted by Savigny, where "the present situation of the things is so indeterminate that the persons acting cannot be held to have any certain knowledge of it." Neither do the American judges seem to lay any stress on the domicile of the attaching creditor, though in the reasons which they give for adopting the *lex situs* for movables the protection of the citizens of their own states holds a prominent place. The leading authority is the Louisiana one of *Olivier* v. *Townes*, 1824, 2 Martin, N. S., 92, in which Mr. Justice Porter delivered the opinion of the court. "We have presented," he said, "the case of a creditor attaching property of his debtor before it was transferred by sale and delivery," this being a remedy to which a creditor would in that state of facts be clearly entitled by Louisiana law. But, continued the judge, "the position assumed in the present case is that by the laws of all

* Syst. d. heut. Röm. rechts, § 367; Guthrie's translation, p. 138—141.

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civilized countries the alienation of movable property must be determined according to the laws rules and regulations in force where the owner's domicile is situated: hence it is insisted that as by the law existing in the state where the vendor lived no delivery was necessary to complete the sale, it must be considered as complete here, and that it is a violation of the principle just referred to to apply to the contract rules which are peculiar to our jurisprudence, and different from those contemplated by the parties to the contract. We readily yield an assent to the general doctrine for which the appellee contends. He has supported it by a variety of authorities drawn from different systems of jurisprudence. But some of those very books furnish also the exception on which we think this case must be decided, namely that 'when those laws clash and interfere with the rights of the citizens of the countries where the parties to the contract seek to enforce it, as one or other of them must give way, those prevailing where the relief is sought must have the preference.' Such is the language of the English book to which we have been referred." It is unfortunate that the court did not rather deny the general doctrine contended for by the appellee. In doing so they would have been in harmony with the main current of legal opinion in the world, and their decision in favour of the attaching creditor would probably not have excited the antagonism which has been expressed to it in England and by Story. But it had little chance of escaping that antagonism when under the name of an exception it took away almost all possible application from the rule which it nominally admitted, and this avowedly for the convenience of the citizens of Louisiana. Yet the judgment is not without a trace of the true distinction between the cases, as those of succession, in which property is grouped round the person of its owner, and those, as of alienation, or of special claims against it, in which it is considered independently of its owner. After noticing that "personal property must be distributed according to the law of the state where the testator dies," the learned judge added, "but so far as it concerns creditors it is governed by the law of the country where the property is situated. If an Englishman or Frenchman dies abroad and leaves effects here, we

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regulate the order in which his debts are paid by our jurisprudence, not that of his domicile."

It will, I think, be found that the weight of later English authority is in favour of the doctrine of Fœlix, Savigny, and the United States courts; but before examining the cases from which that conclusion may be drawn, another law or supposed law must be mentioned which in the case of one class of movables, ships, has sometimes been regarded as paramount to all those yet considered, *lex situs*, *lex domicilii*, and *lex loci contractus* or *loci actus*. This is the general law maritime, on which the following case may be cited as a leading one.

"A ship belonging to a British owner at Liverpool, having been taken by alleged pirates, and recaptured by one of her majesty's ships of war after her master had been killed, was placed in charge of a master of the royal navy to bring to Liverpool. Having suffered considerable damage, he put into the island of Fayal, and petitioned the director of the customs for an official survey. Three were made. The report was to the effect that the ship could be repaired for about £300. The master being dissatisfied obtained a private survey, which resulted in a report that the ship was unseaworthy and should be condemned. The director of the customs then, on the petition of the master, decreed the sale of the ship by public auction, and gave official notice thereof according to the custom of the place. She was purchased by a Portuguese merchant, who immediately repaired her and sent her with a cargo to Bristol, where she was arrested by the original owner in a cause of possession. Held, 1. The master had the authority of an ordinary master, and no more. 2. The validity of the sale must be tried by the law maritime. 3. By the law maritime, as well as by the law of England, the sale of a ship by a master, though *bona fide*, can be justified only by urgent necessity. 4. With respect to ships, the *lex loci contractus* cannot prevail if opposed to the law maritime. 5. The circumstances of the case do not show an urgent necessity for the sale; and 6. The sale was invalid, and the ship must be restored to the original owner with costs." [Marginal note, *verbatim*.] *The Segredo, otherwise Eliza Cornish*, 1853, Spinks, Eccl. & Adm. 36, Lushington.

The law which Dr. Lushington thus thought himself bound to apply is described by him as follows. "First, it strikes me that the law which I must seek to administer, if I am able to discover it, is the law maritime: a law which has been often adverted to by Lord Stowell and by others whose lights I seek to guide me, but which has been defined by none. Perhaps it is not possible to define it with great accuracy, because the law of almost every foreign country in some part differs from that of other foreign countries. Still it is

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an expression in common use, and I apprehend it is intended to convey the meaning that it is the law which generally is practised by maritime nations." (*U. S.*, p. 45.) And the learned judge proceeded to distinguish it from the respective laws of England and of the island of Fayal. Further on, he referred to it as "the present maritime law of the civilised world." (*U. S.*, p. 56.) The learned judge then asked himself whether he could adopt the law of Fayal "on the principle of the *lex loci contractus?* In what way," said he, "does the *lex loci contractus* in the case of a sale of a ship entitle itself to be so admitted? If such general proposition could be entertained, the law relative to the sale of ships would be a law varying with the law of each individual country wherever the sale happened to take place; in fact there would be no general maritime law at all, but a law to be enquired into in every case where the transfer took place in a foreign country. I should have one law to look for at Fayal, another in our own colonies, another in Demerara, another in Trinidad, another in French colonies, another in England. Now I know of no right which the purchaser of a ship in a foreign country, such ship not belonging to a subject of that country, has to call for the interposition of the *lex loci contractus*, save indeed in one case only, where the title is derived from the decree of a competent court administering the law in its own jurisdiction, and by its decree conferring a title. Now had the ship been purchased under the decree of a court of admiralty, directing her to be sold in a case within its jurisdiction, or the law of a court resembling our own court of exchequer, I should have hesitated long before I disputed that title." (*U. S.*, p. 57.)

After enlarging on the last point, Dr. Lushington concluded his argument on it thus: "I wish it to be understood that in the event of a title being given by an admiralty court having jurisdiction, or a court of common law, I do not preclude myself from considering that to be a valuable title. Again, I should consider this: supposing a vessel was sold by decree of the commissioners, or the court of exchequer, for forfeiture, that I should hold a good title, if such a case should occur. Supposing a vessel sold in a foreign country under the law prevailing in cases of insolvency or bankruptcy, I

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should hold that also to be a good sale. But I wish it to be understood that I go on the ground that nothing short of that appears capable of justifying a sale and making a good title." And after expressing his consent to the principle "that the *lex loci contractus generally* governs the validity of every contract," he referred for certain exceptions to a note of Mr. Brodie in his edition of lord Stair's Institutes. "There appear to me," said Lushington, "according to his," Brodie's "judgment, several reasons why the *lex loci contractus* is not always applicable. He says this: 'A distinction is ever to be attended to between the case of a party casually entering a foreign country and that of one who resides in it, and the distinction is particularly strong in regard to an individual who, as master, has the charge of a vessel in a foreign port.' Then he states he is under these circumstances likely to be ignorant of the law of the country, and not to be too tenaciously bound. Then there is another distinction, and that by far the most important. 'The contract,' says Mr. Brodie, 'in such cases is made with the shipmaster, who acts as the implied mandatory of the owner; and the effect of the transaction must greatly depend on the extent of his authority. Now it is true that as a person who has been appointed to an office must be presumed to be invested with the usual powers, so restrictions upon the ordinary authority will not be effectual against another party who has not been apprized of them; yet it will be observed that since it is the duty of those who deal with an agent to make themselves acquainted with the extent of his powers, whether expressed or fairly implied from his office, so the presumed mandate here must be measured either by some general principle of maritime law, or by the law of the country to which the ship belongs. Such a general principle of maritime law would of itself, though in a different way, tend in my apprehension to exclude the *lex loci;* but there is no such universally received principle, and the more positive exclusion of the principle of the *lex loci* is the consequence;' and then he goes on to state what the English law of hypothecation is, and how we should apply it." (*U. S.*, p. 58, 59.)

The opinions expressed by Dr. Lushington in the case of the *Segredo* may therefore be summed up as follows. (1) A decree *in*

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rem of a court of admiralty or of common law, or a sale made in a bankruptcy, binds the title to a ship as well as to any other movable, the jurisdiction of the court of bankruptcy, or of the court decreeing *in rem*, being of course assumed to be established. (2) The authority of an agent to sell or hypothecate a ship cannot be derived from the *lex situs* or *lex loci contractus*, but may be derived not only from his instructions, or from the law of the country to which the ship belongs, but also from the law maritime, contrary to Mr. Brodie's opinion, who held that no such law can be appealed to, as none is universally received. (3) Except in the cases mentioned under (1), to which the learned judge would no doubt have been ready to add that of a sale under the authority of a court of probate or administration, a sale under public authority in the *situs* leaves it still necessary to examine the authority of the person who assumes to sell. The other parts of these propositions will have to be further considered in due place, but with regard to the notion of a general maritime law as actually in vigour for any purpose, the opinion of Mr. Brodie may at once be accepted. If the idea were admitted, the actual determination of such a law would encounter the difficulty which theologians have found in applying the maxim *quod semper, quod ubique, quod ab omnibus*. In fact however, the conception which has almost universally been formed of private international law is that of choosing in each case between different national laws, not that of setting up a body of doctrine in the form of a law but without any national legal sanction. When "the general law maritime, as it is administered in England by courts of admiralty," is mentioned, those terms must be taken to describe a certain part of the law of England, not derived from any specially English custom or legislation, but which, so far back as it can be traced in our law, possessed legal sanction over all or most of those tracts which were included within the horizon of our early lawyers. "The general maritime law as administered in England, or to avoid periphrasis the law of England"—said justice Willes, delivering the judgment of the court of appeal in *Lloyd* v. *Guibert*, L. R., 1 Q. B. 125. The subject will be further discussed in the chapter on torts, with reference to collisions at sea.

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Coming now to the doctrines received in England on the effect of different judgments and laws on the property in movables, I began in the last edition of this book with that of judgments *in rem*, because it then appeared to be better settled than was the case with questions about the effect of laws which in the particular instance have not been embodied in any such judgment, not that the authority of a judgment *in rem* appeared to rest on any principle not involved in that of a law. The practical identification of the two classes of questions, as both resting on the disposing power of the sovereignty of the *situs*, has since received further support; but the order of treatment will not here be varied, as well because judgments and laws are equally direct applications of sovereignty as because of the interest which attaches to the historical development of the English doctrines.

§ 149. The property in a movable will be held in England to be such as the judgment *in rem* of a court within the jurisdiction of which the movable was situate has decided it to be. The distinctive mark of a judgment *in rem* on a movable is that it disposes of the thing itself, and not merely of the interests which any parties have in it. It is immaterial whether the judgment does this (1) by vesting the property at once in a party as against all the world, as a condemnation in a revenue cause vests the property in the crown, or the sentence of a court of admiralty in a matter of prize vests the property in the captors; or (2) by decreeing or confirming the sale of the movable in satisfaction of a money demand which it adjudges to have been a lien on the thing itself, and not merely on the interests of any parties in it; or (3) by decreeing or confirming the sale of the movable by way of administration, in matters of bankruptcy or succession on death. The second case is easily distinguished from that of a sale under execution, in which only the interest of the debtor is intended to be disposed of; and the characteristic of the third case is that the court claims to act on one of the so-called universal assignments, and therefore to conclude even those who may not accept the permission to come in and take the benefit of the proceedings.

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The leading authority is *Castrique* v. *Imrie*, 1860, 8 C. B., N. S., 1; Erle, Williams, Willes, Keating: reversed, 1860, 8 C. B., N. S., 405; Cockburn, Wightman, Channell, Hill, Blackburn, Martin, Bramwell: reversal affirmed, 1870, L. R., 4 E. & I. A. 414; Hatherley, Chelmsford, Colonsay; in accordance with the opinion of Blackburn, Bramwell, Mellor, Brett, and Cleasby, and of Keating, who departed from his previous opinion in deference to the judgment on appeal in *Cammell* v. *Sewell*. The last named case was decided in 1858, 3 H. & N. 617, by Pollock, Martin and Channell; and affirmed in 1860, 5 H. & N. 728, by Cockburn, Wightman, Williams, Crompton and Keating, Byles dissentient. The definition given in the § of a judgment *in rem* on a movable is in accordance with all the judicial opinions in *Castrique* v. *Imrie*, except that the French judgment there in question was held by Williams, Willes and Keating not to be *in rem*, merely from their taking a different view as to the facts of the French proceedings. The third case of judgments *in rem* mentioned in the § was noticed, so far as concerns sales in bankruptcies, by Lushington in *The Segredo*; see above, pp. 174, 176. In *Cammell* v. *Sewell* the question was about the right gained to some deals, the cargo of a vessel wrecked on the coast of Norway, by purchase at a sale in that country held under the authority of the captain, and confirmed in the same country in a suit brought by the agent of the underwriters to have the deals delivered up *in specie*. The case was decided in the lower court on the ground of this Norwegian judgment, Martin, on behalf of Pollock and Channell as well as of himself, describing it as being in the nature of one *in rem* on account of the prayer for specific delivery; but the circumstance that the underwriters, plaintiffs in England, were privy to it was dwelt on as an element in its conclusiveness, notwithstanding that a judgment *in rem* is conclusive against all the world. On the appeal a clearer view was taken of the nature of judgments, and the decision in favour of the purchaser was put on the ground of the sale being a good transfer by the law of Norway, which was the *situs* of the deals. Blackburn, delivering the opinion of the judges in *Castrique* v. *Imrie*, said: "We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from Story. We think the enquiry is first, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the court sits; and secondly, whether the sovereign authority of that state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world." L. R., 4 E. & I. A. 429. These words are valuable as expressing the principle on which the international validity of a judgment *in rem* rests, as well as the condition for such validity, namely that the movable shall have been within the territorial jurisdiction of the court pronouncing it.

In *Simpson* v. *Fogo*, 1860, 1 J. & H. 18; 1863, 1 H. & M. 195; Wood; a New Orleans judgment came under consideration in peculiar circumstances. A British ship, belonging to Liverpool, was mortgaged in English form to a Liverpool bank, while she was at sea, and therefore when there was no *lex situs* to compete with the law of the owners' domicile as to the sufficiency of the mortgage. Afterwards unsecured creditors of the mortgagors attached her at New

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Orleans, where delivery is necessary to perfect a real right in a movable, and she was sold under decree in the suit so commenced, the mortagee intervening and ineffectually claiming possession. The mortgagee, whose debt exceeded the value of the ship, sued the purchaser in England, whither she had been brought, and recovered her; the purchaser however being allowed a lien for what, in the distribution of the proceeds of sale at New Orleans, had been paid to certain creditors who had a real right under the law of that place, by virtue of which they might have arrested the ship. It was even admitted by the vice-chancellor that had the ship been sold in a suit commenced by their arresting it, the property would have passed: 1 H. & M. 248. Full justice was therefore done to the real rights conferred by the *lex situs*, or recognized by the Court of the *situs*. The sale under decree in an attachment suit passed only the debtor's interest in the movable, and whatever controversy might be raised as to its validity against the mortgagee on the ground of his intervention, it at least had no validity against him on the footing of a judgment *in rem*. See Blackburn's remarks in *Castrique* v. *Imrie*, L. R., 4 E. & I. A. 436.

We now come to the effect of laws independent of their embodiment in judgments *in rem*. Having seen lord Blackburn tracing the respect due to such judgments to the sovereign authority of the state within which the movable is situate, we shall be prepared to find an equal respect paid to the will of the same authority when manifested in the simpler form of a law. And we shall not be disappointed, if the next section truly expresses the state of the English decisions, as we may now say that it does.

§ 150. Questions as to the transfer or acquisition of property in corporeal movables, or of any less extensive real rights in them, as pledge or lien, are generally to be decided by the *lex situs*. If the question refers to a ship which was at sea at the moment of the alleged transfer or acquisition, it must be decided by the personal law of the owner, that is, of the person from or against whom the transfer or acquisition is alleged to have taken place: that law will operate either as the *lex situs*, on the ground of the fiction which makes ships a part of the territory ascertained by their flag, or in its own character of the personal law, in obedience to which alone the owner can lose his right when no *lex situs* is applicable against him. It would however be pedantic to apply the general doctrine so as to bring in the law of a casual and temporary *situs*, not contemplated by either party in the dealing under consideration, as in the case of goods which at the moment of the dealing

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may be on board a ship of a third country, or temporarily warehoused in a port of a third country. See Savigny as to this: above, p. 170.

The English authorities in support of this view begin about as far back as those quoted in pp. 165—167, in favour of the law of the owner's person.

"A delivery by the consignor of goods on board a ship chartered by the consignee is a delivery to him, and the consignor cannot afterwards stop them *in transitu*. But where the delivery was made on board such a ship in Russia, and by a law of that country the owner of the goods, in case of the bankruptcy of the vendee, may sue out process to retake his goods on board a ship &c. and retain them till payment; and the owners, hearing of the insolvency of the vendee, applied to the captain on board of whose ship the goods had been delivered to sign the bill of lading to their order, which he complied with without the necessity of suing out process; held that this was a substantial compliance with such law, and that the captain on his arrival here was bound to deliver the goods to the order of the vendors, and not to the assignees of the vendee who had become bankrupt." *Inglis* v. *Usherwood*, 1801, 1 East 515; Kenyon Grose, Lawrence, Le Blanc. Kenyon and Lawrence spoke of "the transaction" being in Russia, which might have referred to the contract of sale; but Grose said "the delivery here was made in Russia," thus bearing out the reference to that point in the marginal note, which I have copied *verbatim*. No judge alluded to the vendor's domicile. It appears therefore that the question, at what moment the property in the goods was indefeasibly transferred, was decided on the *lex situs*.

"The captain of a ship has no authority to sell the cargo, except in cases of absolute necessity; and therefore, where in the course of a voyage from India the ship was wrecked off the Cape of Good Hope, and some indigo which was part of the cargo was saved, and the same was there sold by public auction, by the authority of the captain acting *bona fide* according to the best of his judgment for the benefit of all persons concerned, but the jury found there was no absolute necessity for the sale: Held that the purchaser at the sale acquired no title, and the indigo having been sent to this country, the original owners were entitled to recover its value." *Freeman* v. *East India Company*, 1822, 5 B. & Ald. 617; Abbott, Bayley, Holroyd, Best. Best said, speaking of the purchaser's knowledge of the circumstances, "supposing the law of Holland," which was in force at the Cape, "to be, as it is stated to be, the same as the law of England, this knowledge will prevent the purchaser protecting himself under a sale in market overt." On this Mr. Justice Crompton remarked in *Cammell* v. *Sewell*, "in the case of *Freeman* v. *The East India Company* the court of king's bench appear to have assented to the proposition that the Dutch law as to market overt might have had the effect of passing the property in such case, if the circumstance of the knowledge of the transaction had not taken the case out of the provisions of such law:" 5 H. & N. 745.

Cammell v. *Sewell* has already been noticed above, p. 178. In the court below, Pollock said, although his opinion in that respect was not adopted as the ground of the judgment: "If personal property is disposed of in a

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manner binding according to the law of the country where it is, that disposition is binding everywhere." 3 H. & N. 138. On the appeal Crompton, delivering the opinion of all the court except Byles, said: "Many cases were mentioned in the course of the argument, and more might be collected, in which it might seem hard that the goods of foreigners should be dealt with according to the laws of our own or of other countries. Amongst others our law as to the seizure of a foreigner's goods for rent due from a tenant, or as to the title gained in them, if stolen, by a sale in market overt, might appear harsh. But we cannot think that the goods of foreigners would be protected against such laws, or that if the property once passed by virtue of them it would again be changed by being taken by the new owner into the foreigner's own country." He then quoted with approval Pollock's dictum in the court below, and added: "We do not think that it makes any difference that the goods were wrecked, and not intended to be sent to the country where they were sold. We do not think that goods which were wrecked here would on that account be less liable to our laws as to our market overt, or as to the landlord's right of distress, because the owner did not foresee that they would come to England." Byles did not dissent on the ground of the owner's *lex domicilii*, but because the "alleged law of Norway" seemed to him to be "of an alarming nature," "and at variance with the general maritime law of the world, at least as understood in this country." Cockburn added to his concurrence in Crompton's judgment a remark which, as to the last mentioned law, placed him on the side of Brodie as against Lushington: "The law of nations cannot determine the question, for the international law is by no means uniform as to the powers of a master, as abundantly appeared from the various codes which were brought to our notice during the argument." 5 H. & N. 744, 5, 7, 50. Pollock's dictum was quoted with approval by Bramwell in *Castrique* v. *Imrie*, 8 C. B., N. S., 430; and Blackburn, delivering to the house of lords the opinion of the judges in the same case, adverted to it thus. "In the case of *Cammell* v. *Sewell*, a more general principle was laid down, namely that 'if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.' This we think as a general rule is correct, though no doubt it may be open to exceptions and qualifications; and it may very well be said that the rule commonly expressed by English lawyers, that a judgment *in rem* is binding everywhere, is in truth but a branch of that more general principle." L. R., 4 E. & I. A. 429.

In *Coote* v. *Jeekes*, 1872, L. R., 13 Eq. 597, Bacon, it was held that the English bills of sale act does not apply to a bill of sale of goods in Scotland, given in England by an English debtor to an English creditor.

In *Liverpool Marine Credit Company* v. *Hunter*, 1867, L. R., 4 Eq. 62, Wood; affirmed 1868, L. R., 3 Ch. Ap. 479, Chelmsford; it was decided that domiciled Englishmen will not be restrained from attaching ships at New Orleans because justice will not be done there to domiciled English mortgagees, and that bonds given by such mortgagees at New Orleans for the purpose of obtaining the release of the ships may be sued on in England. It must be observed that according to the allegations made in this case and in *Simpson* v. *Fogo* (above, p. 178), the courts at New Orleans go so far beyond the doctrine mentioned above, pp. 171, 172, as to disregard transfers and pledges of movables made without delivery, although complete before the arrival of the movables in Louisiana. For the present purpose, attention must be drawn to

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Wood's expression in respect to foreign statute law, "however harsh and arbitrary it may be," though he "was particularly anxious to draw a distinction between judicial procedure and the statute law of a foreign state:" L. R., 4 Eq. 68. Also to Chelmsford's reassertion of the old doctrine of Loughborough, in these terms; "the transfer of personal property must be regulated by the law of the owner's domicile, and if valid by that law ought to be so regarded by the courts of every other country where it is brought into question:" L. R., 3 Ch. Ap. 483. It already seemed impossible, in the face of the other authorities here collected, to accept this rule further than it has been admitted in framing § 150; and the § has since been supported by *City Bank* v. *Barrow*, 1880, 5 Ap. Ca. 664; Selborne, Hatherley, Blackburn, Watson. Lord Blackburn said: "The pledge upon which the defendants claim was made in Canada in respect of goods then in Canada. I take it therefore that there is no doubt that the validity of the pledge depends upon the Canadian law." Lindley, as judge of first instance in this case, all the judges in the court of appeal, and all the noble lords went on the law of Canada as they respectively understood it to be, although the owners of the pledged goods were an English house; thus disregarding the law of the owner's domicile.

§ 151. A distinction may now be noticed which was not adverted to in *The Segredo* (above, p. 178), and possibly may not have arisen on the facts of that case, the law of Fayal having been very imperfectly proved in it. A law by which the owners are not bound cannot confer an authority on an agent as against them; but notwithstanding this the *lex situs* may, if it pleases, confer a title on the purchaser or pledgee of a movable by reason of the agent's acts. The question of an agent's authority belongs to the law of contract; the question of a purchaser's or pledgee's title belongs to the law of property, and must be ultimately decided by the law which governs property, although that law may make the authority of the selling or pledging agent, as determined on principles applicable to contract, an element in its decision.

In *Cammell* v. *Sewell*, Crompton, delivering the opinion of all the court except Byles on the appeal, said: "The conclusion which we draw from the evidence is that by the law of Norway the captain, under circumstances such as existed in this case, could not, as between himself and his owners or the owners of the cargo, justify the sale, but that he remained liable to them for a sale not justified under the circumstances; whilst on the other hand an innocent purchaser would have a good title to the property bought by him from the agent of the owners. It does not appear to us that there is any thing so barbarous or monstrous in this state of the law as that we can say that it should not be recognized by us. Our own law as to market overt is analogous; and though it is said that much mischief would be done by uphold-

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ing sales of this nature, not justified by the necessities of the case, it may well be that the mischief would be greater if the vendee were only to have a title in cases where the master was strictly justified in selling as between himself and the owners. If that were so, purchasers, who can seldom know the facts of the case, would not be inclined to give the value, and on proper and lawful sales by the master the property would be in great danger of being sacrificed." 5 H. & N. 743.

When a foreign ship is sold under such circumstances that the purchaser does not get a good title independent of a personal equity against the vendor, the *lex loci contractus* must determine whether the foreign owner has so acted as to prevent his disputing the purchaser's title. *Hooper* v. *Gumm*, *M'Lellan* v. *Gumm*, 1867, L. R., 2 Ch. Ap. 282, Chelmsford and Turner, in the latter case affirming Wood, in the former reversing him on the question of fact.

The title to certificates of American railroad shares, those certificates being in England and the title to them depending on dealings in England, must be decided by English law; but the consequences of the title to the certificates, with regard to the title to the shares, must be decided by American law. *Williams* v. *Colonial Bank*, *Williams* v. *London Chartered Bank of Australia*, 1888, 38 Ch. D. 388; Cotton, Lindley, and Bowen, agreeing so far with Kekewich.

§ 152. The *forum* for the recovery of a debt presents much analogy with the *situs* of a corporeal movable, and notice to the debtor of the assignment of a debt presents much analogy with the delivery of a corporeal movable to the transferee of it. As there are laws by which delivery is not necessary to complete the transfer of a corporeal movable, so there are laws, like that of England, by which, although the debtor will be discharged if he pays the transferor of a debt before receiving notice of the transfer, and although the transferee, suing for the debt before such notice has been given, perhaps in a certain form, may have to use the name of the transferor and be exposed to any defence which would be good against the transferor, yet the transfer will be so far complete by assignment without notice that notice *pendente lite* will prevent the debt from being recovered by a posterior assignee or attaching creditor. And as there are laws by which delivery is necessary to complete the transfer of a corporeal movable, so there are laws, like that of Scotland, by which the assignment of a debt without notice to the debtor is so ineffectual that notice *pendente lite* comes too late. Consequently opinions analogous to those on the law which should govern the transfer of a corporeal movable have been entertained on

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the law which should govern that of a debt. Lord Kames (see above, p. 167) and Story (*Conflict of Laws*, § 397) hold that the assignment of a debt, complete without notice by the law of the creditor's domicile, must be held complete everywhere. This question could hardly arise in England as between persons claiming under earlier and later assignments, the English law not requiring notice as between such parties; and the whole subject of the transfer of debts may therefore, for our purposes, be postponed till it can be considered in connection with the international law of obligations. Where a right is claimed by way of real privilege or lien on a chose in action, there is an English case which maintains the *lex fori*.

A citizen of the United States shipped at San Francisco as second mate on board an American ship bound for England, and became master during the voyage by reason of successive deaths. On his proceeding in the court of admiralty against the freight for wages due to him, it was held that his claim was governed by the *lex fori* and not by the *lex loci contractus* of his engagement as mate, and that the former was to be found in the Merchant Shipping Act, and not in the law maritime as previously administered in England. *The Milford*, 1858, Swabey 362, Lushington. The same great lawyer expressed his adherence to that judgment in *The Jonathan Goodhue*, 1859, Swabey 526; but Phillimore, in *The Halley*, 1867, L. R., 2 A. & E. 12, remarked: "I must say that the reasoning of the learned judge which led to the decisions in these cases was never satisfactory to my mind, and I am glad to learn that in a more recent case mentioned to me by Mr. Clarkson the learned judge expressed himself willing to reconsider the principle of these decisions." The opinion of Lushington must, however, be deemed to have remained such as he expressed it, and to have been in favour of the *lex fori* as deciding on the existence of an incorporeal real right. It is true that he based it on the rule "that the remedy must be according to the law of the *forum* in which it is sought": Swabey 366. But that rule, in its other and more familiar applications, refers to the form of the remedy, or at the utmost to its existence as depending on laws of procedure, which statutes of limitation are generally considered in England to be, not to its existence as depending on that of a right. To apply the rule in the manner in question in *The Milford* was really to attribute to the *forum* for an incorporeal real right a legal weight corresponding to that of the *situs* for corporeal movables.

In a case where the assignment of an English policy of life insurance to the wife of the assignor was not permitted by the law of the place of assignment, it was held to be void in England: *Lee* v. *Abdy*, 1886, 17 Q. B. D. 309, Day an Wills. But the domicile of the assignor and assignee at the place of assignment was also referred to.

The doctrine that a restraint on anticipation annexed to the gift of property by an English settlement is valid whatever may be the personal law of the wife

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(*Peillon* v. *Brooking*, 1858, 25 Beav. 218, Romilly), taken in connection with the test of a settlement being English (§ 116, p. 127), is an example of the property in movables being governed by the *lex situs*, or what is equivalent thereto in the case of incorporeal rights. But the subject of the § still requires elucidation by English authorities.

§ 153. The rule that the *lex situs* governs the property in movables, as developed in the preceding part of this chapter, applies in general to the beneficial interest as well as to the legal property; but in cases falling under the so-called universal assignments the personal law may bind the beneficial interest while the *lex situs* must be complied with as to the legal property, as in the case of § 135. The English rules as to succession on death (§§ 59, 63, 64, 110) present a third variety, the personal law not being allowed to govern even the entire beneficial interest in the movables, but only that in the surplus remaining after the payment of the debts of the deceased.

We now pass to questions concerning the international character of special classes of movables.

§ 154. A British ship is British territory so long as she is sailing on the high seas, or in a foreign tidal river below all bridges, although in the latter case, if she is a private ship, the state to which the river belongs may have concurrent jurisdiction. If she belongs to an English port, the law applicable in consequence of her being British territory is that of England.

Regina v. *Lopez*, 1858, 1 D. & B. 525; *Regina* v. *Sattler*, 1858, 1 D. & B. 539; decided together by Campbell, Cockburn, Pollock, Coleridge, Wightman, Erle, Williams, Martin, Crompton, Crowder, Willes, Watson, Channell and Byles. *The Queen* v. *Anderson*, 1868, L. R., 1 C. C. R. 161; Bovill, Channell, Byles, Blackburn, Lush. These were cases of crimes committed on board British ships, and in the last case the ship was sailing in a foreign tidal river. The statement in the § is equally true although the ship is moored to a quay in a foreign river; and not only her crew but all persons coming on board of her in any manner are subject to British criminal jurisdiction: *The Queen* v. *Carr*, 1882, 10 Q. B. D. 76; Coleridge, Pollock, Lopes, Stephen, Watkin Williams.

Marshall v. *Murgatroyd*, 1870, L. R., 6 Q. B. 31; Blackburn and Lush; order of affiliation under English law, against the putative father of a child born at sea on board a British ship belonging to Liverpool, sustained.

See the American case of *United States* v. *Hamilton*, 1816, 1 Mason 152, Story. "The admiralty," that eminent judge said, "has never held that the waters of havens where the tide ebbs and flows are properly the high seas,

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unless those waters are without low-water mark. The common law has attempted a still more narrow construction of the terms."

An Italian ship being brought into an English port as a derelict, effect was given to a charge to which she was already subject by Italian law for the expenses incurred by the Italian government in sending the crew home: *The Livietta*, 1883, 8 P. D. 209, Hannen.

For a precise examination of the question what constitutes a British ship, the reader is referred to the usual treatises on the British law of shipping. One of the latest utterances is that of lord justice Brett (lord Esher), in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company*, 1883, 10 Q. B. D. 534—6.

§ 155. Although a foreign sovereign or state is certainly entitled to protection in England for civil rights, whether of property or of obligation, and whether, in the case of a sovereign, they belong to him in his private or in his public character, it is doubtful how far a foreign sovereign or state is entitled to protection in England for political rights, even though pecuniary profit may be derivable from them. In other words, it is doubtful whether a political right can be considered in England as a chattel or movable, on the ground that pecuniary profit may be derived from it. In *Emperor of Austria* v. *Day and Kossuth*, 1861, 2 Giff. 628, Stuart; 3 D. F. J. 217, Campbell, Knight-Bruce and Turner; this question arose on the emperor's seeking an injunction to restrain the infringement of his exclusive right of issuing paper currency to circulate within his dominions. Stuart granted the injunction as in support of a right, without thinking it necessary to found it on the pecuniary value of that right, but all the judges on the appeal differed from him as to this. Campbell and Knight-Bruce sustained the injunction on the ground of the pecuniary value of the right to the plaintiff. Turner thought it not sustainable on that ground, but sustained it on the ground of "the injury to the subjects of the plaintiff by the introduction of a spurious circulation." Lord Campbell noticed as follows another kind of political rights productive of pecuniary profit, which will meet us again when considering the international validity of contracts. "A more specious objection was rested on the class of cases

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in which it has been held that we take no notice of the 'revenue laws' of foreign countries, so that an injunction would certainly be refused to a foreign sovereign who should apply for one to prevent the smuggling of English manufactures into his dominions to the grievous loss of his fisc. But although from the comity of nations the rule has been to pay respect to the laws of foreign countries, yet, for the general benefit of free trade, 'revenue laws' have always been made the exception; and this may be an example of an exception proving the rule." (U. S., p. 241.)

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CHAPTER VIII.

IMMOVABLES.

It has already been noticed, p. 9, that the principle of the *lex situs*, or of the real statute, was eagerly seized on in England in its application to land, and received there its utmost development in that respect. Accordingly, in stating the English doctrines on the subject of immovables, we shall merely have to expand that principle into a series of propositions supported by authorities among which there is little conflict. What doubt there is turns more on the question of jurisdiction than of law. The principle of the *forum situs*, in its application to the land itself, is incontrovertible. Since only the authorities that exist on the spot can employ force to give possession or take it away, it would be idle for any foreign jurisdiction to make a direct attempt to determine the possession of land, or even the property in it, which would be unmeaning if disconnected from all immediate or future right to possession. But an indirect attempt may be made by a foreign jurisdiction to determine the possession or the property in land, by compelling one who is personally subject to its authority to employ those possessory or proprietary rights which he possesses in the *forum situs* in such a manner as to give effect to a determination which in itself would be nugatory. The reasonable principle appears to be that this should not be attempted on the mere ground of the personal jurisdiction, but only when something has been done by which the personal jurisdiction is called into action on the ground of obligation which properly belongs to it, and the determination as to the foreign land is necessarily incident to the determination which has to be made about the obligation. But it will be easily seen that in the applica-

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tion of this principle there may be some amount of delicacy; and then there are the cases which arise when the immovable right in question is not one to the property or possession of the land itself.

§ 156. All questions concerning the property in immovables, including the forms of conveying them, are decided by the *lex situs*.

The necessity of a seal to the conveyance of an immovable right depends on the *lex situs*: *Adams* v. *Clutterbuck*, 1883, 10 Q. B. D. 403, Cave.

§ 157. Interests in land which are limited in duration, whether for terms of years, for life, or otherwise; interests in land which are limited in their nature, as legal (*ex jure Quiritium*—Gaius) or beneficial (*in bonis*—Gaius); servitudes, charges, liens, and all other dismemberments of the property in land; are immovables as well as the land itself.

§ 158. So long as money produced by sale or otherwise from immovables would, in their *situs*, be considered to represent the immovables and be subject to the same rights, it must be considered to represent them, and be subject to the *lex situs*, in every jurisdiction in which it may happen to become administrable.

See this rule applied to the compensation awarded under the act for the abolition of slavery: *Forbes* v. *Adams*, 1839, 9 Sim. 462, Shadwell.

These three §§ contain the general English doctrine on the subject of the law which must govern immovables. The applications which are made of that doctrine in England to particular questions will be presented in separate §§, on account of their variety and importance. In the arrangement of those §§ it will be found that the cases which illustrate the immovable character attributed to dismemberments of the property in land, and in certain cases to money (principles of §§ 157, 158), and those which illustrate the application of the *lex situs* to what are admitted to be immovables (principle of § 156), run very much into one another; and that the cases which illustrate the question of jurisdiction run very much into those which illustrate that of the law.

§ 159. A rent charge issuing out of land in England is an

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immovable, and when a British statute makes it liable to legacy duty "as personal estate," it is liable to such duty notwithstanding that the deceased owner was domiciled abroad, and the movables left by him are consequently not liable to such duty.

Chatfield v. *Berchtoldt*, 1872, L. R., 7 Ch. Ap. 192, James and Mellish reversing Bacon, 1871, L. R., 12 Eq. 464.

§ 160. When security is given on immovables for a debt which is also personally due, the *lex situs* of the immovables decides whether the debt is to be considered an immovable, that is, as an alienation of so much of the value of the immovables on which it is secured, or as a mere debt with collateral security.

The case is presented by a Scotch heritable bond, in which the debt, though personally due as well as secured on the land, descends to the creditor's heir of immovables, and the debtor's heir of immovables cannot claim exoneration out of the debtor's movables.

Hence:

Where the creditor is domiciled in England, and makes a will which is ineffectual to pass Scotch immovables, the debt descends to his Scotch heir: *Johnstone* v. *Baker*, 1817, 4 Madd. 474 note, Grant; *Jerningham* v. *Herbert*, 1829, 4 Russ. 388, Tam. 103, Leach; *Allen* v. *Anderson*, 1846, 5 Ha. 163, Wigram. And where the debtor is domiciled in England, his Scotch heir is still unable to claim exoneration out of his personal estate: *Drummond* v. *Drummond*, 1799, house of lords on Scotch appeal, Robertson on Personal Succession, p. 209; *Elliott* v. *Minto*, 1821, 6 Madd. 16, Leach. See above, § 118.

§ 161. Only if a separate security be taken in another country for the same debt, the last § will not apply, because the *lex situs* of the immovable security will be unable to affect the entire character of the debt.

Where an English security was taken for a debt secured by a Scotch heritable bond, the debt passed to the creditor's legatee, notwithstanding that the will was ineffectual to pass Scotch immovables: *Buccleugh* v. *Hoare*, 1819, 4 Madd. 467, Leach, who exercized his personal jurisdiction over the creditor's Scotch heir by declaring him a trustee for the legatee: *Cust* v. *Goring*, 1854, 18 Beav. 383, Romilly.

§ 162. No law as to the mode of satisfying debts and legacies which may prevail in the country where the estate of a deceased

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person is being administered, not even if he was domiciled there, can throw on his immovables a heavier burden in respect of his debts or legacies than is thrown on them by the *lex situs*.

Harrison v. *Harrison*, 1872, Selborne, James and Mellish, and 1873, Selborne and Mellish, reversing Romilly, 1872, whose attention had not been called to the point; L. R., 8 Ch. Ap. 342.

§ 163. If a contract is void by the *lex loci contractus*, an immovable security given for it will be void also, notwithstanding that the contract would not have been void by the *lex situs* of the security.

Richards v. *Goold*, 1827, 1 Molloy 22, Hart.

§ 164. Terms of years in English land, though personal estate by English law, are recognized in England as being immovables for the purposes of private international law, subject however to § 169.

The Thellusson act applies to a disposition of leaseholds for years in England by a testator domiciled in Ireland: *Freke* v. *Carbery*, 1873, L. R., 16 Eq. 461, Selborne. The succession to leaseholds for years in Ireland, on the death of an owner domiciled in Italy, depends on the law of Ireland, and administration will be granted accordingly: *Re Gentili*, 1875, Ir. L. R., 9 Eq. 541, Allen.

The mortmain act applies to leaseholds for years in England, and the property or amount of which the charitable application is defeated by it goes to the next of kin by the law of England: *Duncan* v. *Lawson*, 1889, 41 Ch. D. 394, Kay.

§ 165. All questions concerning a restraint on the alienation or disposition of immovables are to be decided by the *lex situs*; whether the restraint be general or special, and, if special, whether directed against alienation or disposition in certain modes, as by will, or in favour of certain persons, as between husband and wife, or for certain purposes, as charitable purposes; and whether the restraint be total, or limited to a certain proportion of the value.

The mortmain act applies in restraint of the disposition of English land, even though the charitable purpose is to be executed abroad: *Curtis* v. *Hutton*, 1808, 14 Ves. 537, Grant. It may here be mentioned, though not falling strictly under the §, that in administering the estate even of a testator domiciled abroad, the English court will not give effect to a bequest of personalty, tending to bring English land under a charitable trust contrary to the mortmain act: *Att.-Gen.* v. *Mill*, 1827, 3 Russ. 328, Lyndhurst; affirmed, 1831, 2 D. & Cl. 393, Lyndhurst. Also that foreign immovables are regarded by the English court

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as pure personalty, for the purposes of the mortmain act: *Beaumont* v. *Oliveira*, 1868, L. R., 6 Eq. 534, Stuart; 1869, L. R., 4 Ch. Ap. 309, Selwyn and Giffard.

In connection with the case last cited it may be mentioned that at a time when English real estate was not in all cases subject to the payment of the debts of its deceased owner, it was said of a foreign immovable: "note also in this case that though it be an inheritance, yet, being in a foreign country, it is looked upon as a chattel to pay debts and a testamentary thing." *Noell* v. *Robinson*, 1681, 2 Ventris 358, Nottingham.

§ 166. No guardian, curator, committee of the estate, or assignee in bankruptcy, either appointed by a foreign jurisdiction or holding the office by virtue of a foreign law, has any authority with regard to the English real estate of his minor, lunatic or bankrupt.

The proceeds of land belonging to a Chilian lunatic, sold under the petition act 1868, were not payable to his Chilian *curator ad bona*: *Grimwood* v. *Bartels*, 1877, 46 L. J., N. S., Ch. 788, Hall.

A Victorian insolvent act gave authority to order the insolvent to convey his real estate out of the colony for the benefit of his creditors. No application for such an order having been made during the life of the insolvent, the title to his English real estate was unaffected. *Waite* v. *Bingley*, 1882, 21 Ch. D. 674, Hall.

§ 167. In the absence of express contract, marriage produces its effect on the English real estate of either consort, whether acquired before or during the marriage, according to English law alone, whatever may be the matrimonial domicile or the place of contracting the marriage.

§ 168. English real estate descends on intestacy according to English law, whatever may have been the personal law of the intestate. See §§ 178, 179.

§ 169. No limited interest, charge, or other dismemberment of the property in English land can be created; nor any English immovable, including a term of years, conveyed inter vivos; nor any English real estate devised by will; except in the form required by English law for such respective purpose. But a term of years in English land will pass to the executor or the administrator with the will annexed, and, subject to the claims of creditors, to the legatee, under any will that satisfies the conditions required for the formal validity of a will of personal estate, as to which see above, §§ 80—90.

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English real estate only passed by a will with three witnesses, when that was the English form for the purpose, although the will was made beyond sea: *Coppin* v. *Coppin*, 1725, 2 P. W. 291, King.

See also *Adams* v. *Clutterbuck*, quoted under § 156.

§ 170. No general rule can be laid down for the construction of contracts, wills, or other dispositions concerning immovables. A stringent rule of construction existing by the *lex situs* of the immovables concerned will of course prevent any instrument from affecting the immovables except in accordance with it, but, otherwise, a reasonable regard must be had to all the circumstances, including the *locus contractus* or *actus*, and the national character or domicile of the parties, testator, or other disponer.

The following cases have arisen, where not otherwise mentioned, as to the currency or place of payment intended, or the rate of interest due, where a will or settlement has charged money on land situate in a country different from that in which the will or settlement was made, or in which the testator or settlor was domiciled.

Phipps v. *Anglesea*, 1721, 1 P. W. 696, 5 Vin. Abr. 209, Parker; *Wallis* v. *Brightwell*, 1722, 2 P. W. 88, Macclesfield; *Lansdowne* v. *Lansdowne*, 1820, 2 Bl. 60, Eldon and Redesdale. In all these cases the decision was in favour of the currency of the testator's or settlor's domicile, but the payment to be in the *situs* of the land charged. In *Holmes* v. *Holmes*, 1830, 1 Ru. & My. 660, Leach, the testator was domiciled at the date of his will in the same country in which the land he charged with an annuity was situate, and the decision was in favour of the then currency of that country, though both that currency and his domicile were changed before his death. Where money was charged on land in Ireland by a marriage settlement made in England, the parties also being apparently either English or Scotch, it was held that in the absence of expression in the settlement to the contrary the Irish rate of interest must be allowed: *Balfour* v. *Cooper*, 1883, 23 Ch. D. 472, Baggallay and Lindley.

The following cases have arisen on the question whether slaves, live stock, and other movables necessary to the enjoyment of an estate, passed by a devise in which the testator only mentioned the estate; and it was held that they did so, conformably to the understanding prevailing in the country where the estate was situate.

Lushington v. *Sewell*, 1827, 1 Sim. 435, Hart; *Stewart* v. *Garnett*, 1830, 3 Sim. 398, Shadwell. In the latter case the testator was domiciled in the country where the estate was situate, but not so in the former.

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§ 171. The term of prescription with regard to the property in immovables depends on the *lex situs*.

Beckford v. *Wade*, 1805, 17 Ves. 87, judgment of privy council delivered by Grant: no exception in favour of absentees, even though they have never been in the *situs*, unless express. In *Re Peat*, 1869, L. R., 7 Eq. 302, James, money arising from the sale of land in India, and in *Pitt* v. *Dacre*, 1876, 3 Ch. D. 295, Hall, rents and profits of land in Jamaica, happened to be administrable in the English court, and claims on them were determined according to the law of prescription of the *situs* whence they had been produced.

§ 172. A proprietor of foreign immovables, or person interested in such, may be compelled by the English court, if it has personal jurisdiction over him, to dispose of his property or interest in them so as to give effect to any obligation relating to them which arises from, or as from, his own contract or tort; and that obligation will not be measured by the *lex situs* of the foreign immovables to which it relates, but in accordance with the rules of private international law on obligations arising from, or as from, contract or tort. "If indeed the law of the country where the land is situate should not permit, or not enable, the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities."

The quotation in the § is from lord Cottenham's judgment in *exp. Pollard*, 1840, Mont. & Ch. 239 (p. 250), 4 Deacon 27; in which case a contract for security on land in Scotland, in the form called in England an equitable mortgage, was enforced against the debtor's assignees in bankruptcy, as representing his person, although ineffectual in itself by Scotch law.

Arglasse v. *Muschamp*, 1682, 1 Vern. 75, Nottingham; bill to be relieved of a charge on plaintiff's land in Ireland obtained by fraud. *Angus* v. *Angus*, 1737, West's cases temp. Hardwicke, Hardwicke; bill for possession of land in Scotland, on ground of fraud. *Penn* v. *Baltimore*, 1750, 1 Ves. Sen. 444, Hardwicke; specific performance of agreement for settlement of boundaries in the American colonies. *Cranstown* v. *Johnston*, 1796, 3 Ves. 170, Arden; *Jackson* v. *Petrie*, 1804, 10 Ves. 164, Eldon; *White* v. *Hall*, 1806, 12 Ves. 321,

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Erskine; bills against creditors charged with fraud in obtaining judicial sales, in the *forum situs*, of estates in the West Indies. In the first case, Sir R. P. Arden made the decree declaring the defendant a trustee of the estate he had acquired, "without saying that this sale would have been set aside either in law or equity there," that is, in the *forum situs*; and added, "I will lay down the rule as broad as this: this court will not permit him to avail himself of the law of any other country to do what would be gross injustice:" 3 Ves. 183. *Cood* v. *Cood*, 1863, 9 Jur. N. S. 1335, Romilly: a proprietor of land in Chili decreed a trustee, and to do all things necessary for giving effect to a contract of sale which the Chilian courts had adjudged not to exist, and enjoined from further proceeding in those courts.

To this § belong also actions against the trustees of settlements or other deeds, to carry the trusts into execution, where foreign immovables are included in them. In such cases, as well as in all others under the § where it may be necessary, receivers will be appointed over the foreign immovables: *Harrison* v. *Gurney*, 1821, 2 Jac. & W. 563, Eldon; *Clarke* v. *Ormonde*, 1821, Jac. 116, 121, Eldon. In *Harrison* v. *Gurney* the trustees, after decree in England, were restrained from proceeding in the *forum situs* for the execution of the same trusts.

In *Jenney* v. *Mackintosh*, 1886, 33 Ch. D. 595, North, leave was given to serve a writ out of the jurisdiction on one of several defendants in whom the legal estate of lands in Trinidad was vested, the beneficial interest in which lands was bound even by the law of Trinidad by a creditors' deed which it was sought to enforce, the other defendants residing in England.

§ 173. But where the relief which might affect the foreign immovables is not sought on any ground falling under the last §, the English court will decline to make its mere personal jurisdiction over the defendant a ground for determining the right either to the property or the possession of foreign immovables, but may perhaps assume to determine such right on the ground of movable property being mixed up in the same proceedings.

An action will not lie in England for the partition of foreign land: *Carteret* v. *Petty*, 1676, 2 Sw. 323 note, 2 Ch. Ca. 214, Finch. Or to try the validity of a will of foreign land: *Pike* v. *Hoare*, 1763, 2 Eden 182, Henley. Or to establish a charge on foreign land on the ground of the proprietor having acquired it with notice of a contract or attempted disposition in which he was neither party nor privy: *Norris* v. *Chambres*, 1861, 29 Beav. 246, Romilly; affirmed, 1861, 3 D. F. J. 583, Campbell. Or to make one who has sold foreign land to which the plaintiff claims title a trustee of the purchasemoney for the plaintiff: *Re Hawthorne, Graham* v. *Massey*, 1883, 23 Ch. D. 743, Kay. *Prima facie*, an injunction cannot be obtained against proceedings in the *forum situs* with regard to immovables: *Moor* v. *Anglo-Italian Bank*, 1879, 10 Ch. D. 681, Jessel. And see *Norton* v. *Florence Land and Public Works Company*, under § 175.

But the doctrine of this § does not seem at one time to have been firmly held.

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No ground but that of the personal jurisdiction appears for the decrees in *Archer* v. *Preston*, cited with approval by Nottingham in *Arglasse* v. *Muschamp*, 1682, 1 Vern. 77; *Kildare* v. *Eustace*, 1686, 1 Vern. 419, Jeffreys, Beddingfield and Atkins; and *lord Anglesey's case*, mentioned by Hardwicke as a decree of his own settling boundaries in Ireland, in *Penn* v. *Baltimore*, 1 Ves. Sen. 454. Something may have been due in these decrees to the superior authority which the English courts then exercized over Ireland, to lands in which they all related; but in *Foster* v. *Vassall*, 1747, 3 Atk. 589, Hardwicke put the colonies on the same footing as Ireland; and Nottingham had decided *Carteret* v. *Petty*, which also related to land in Ireland. The report of *Roberdeau* v. *Rous*, 1738, 1 Atk. 543, Hardwicke, is scarcely intelligible except as to the point mentioned under § 176.

With regard to the last clause of the § ,in *Bunbury* v. *Bunbury*, 1839, 1 Beav. 318, Langdale affirmed by Cottenham, the defendants were taking proceedings in Demerara to establish there a claim to a certain interest in land there, contending that the land had been brought by the *lex situs* into community beween husband and wife. The plaintiff sought that a settlement and will made by the husband, which if the defendants were right could only affect his interest in the land, should be carried into execution with regard both to the land as a whole and to some movable property. And they succeeded in getting the defendants restrained from prosecuting any proceedings in Demerara, on terms no doubt, but that does not affect the principle. In *Hope* v. *Carnegie*, 1886, L. R. 1 Ch. Ap. 320, Turner affirming Stuart, and Knight-Bruce dissenting, where also both movables and foreign immovables were involved (see above, § 107), the proceedings as to the latter in the *forum situs* were restrained, because it was not proved that they could be carried on as to the latter alone.

In *Tulloch* v. *Hartley*, 1841, 1 Y. & C., C. C. 114, Knight-Bruce, a decree appears to have been made for payment of legacies and annuities out of land in Jamaica, and that for that purpose the boundaries of the testatrix's estates in Jamaica might be ascertained, and if necessary settled by commissioners appointed by the English court of chancery.

§ 174. The redemption or foreclosure of mortgages of foreign lands deserves separate notice. The fact that a debt is secured by such a mortgage can be no objection to taking the accounts between a debtor and creditor, and decreeing payment by the former of the balance found due from him, in any court having personal jurisdiction over him. Nor would it be inconsistent with § 173 that on payment by the debtor of the amount found due from him, the creditor should be decreed, by any court having personal jurisdiction over him, to reconvey the land or otherwise clear it of the mortgage. But that foreclosure should be decreed on the debtor's failure to pay would appear to be contrary to § 173, and it can hardly be supposed that the *forum situs* of the security would allow any authority to such a decree, if by the *lex situs* the mortgage was still redeemable, and

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proceedings were taken to redeem it. Nevertheless, the practice in England is to decree foreclosure of mortgages of foreign lands.

Toller v. *Carteret*, 1705, 2 Vern. 494, Wright; *Paget* v. *Ede*, 1874, L. R., 18 Eq. 118, Bacon.

A bill for the redemption of a mortgage of foreign land has not only been entertained, but an injunction granted in support of it against a proceeding to foreclose the mortgage in the *forum situs*, on the ground that the accounts could be more conveniently and satisfactorily taken in England.

Beckford v. *Kemble*, 1822, 1 S. & St. 7, Leach.

And Sir L. Shadwell expressed the opinion that, on a bill for redeeming a mortgage of foreign land, the *lex situs* should be applied.

In *Bent* v. *Young*, 1838, 9 Sim. 180, at p. 190.

This seems to be generally correct, for otherwise the bare personal jurisdiction might take from the defendant immovable property indefeasibly vested in him by the *lex situs*, which would be contrary to § 173: see § 175. But that reason would not apply, and Shadwell would probably not have expressed the same opinion, where the defendant was bound by some special contract, not merely an incident to the security, so as to bring § 172 into play.

§ 175. Where a proprietor of foreign immovables, or person interested in such, is not under any obligation relating to them from, or as from, his own contract or tort, and yet the jurisdiction is entertained, it must be determined according to the *lex situs* whether he is bound to give effect out of his property or interest to any contract relating to them, or attempted disposition of them, of or by third parties, on the ground of his having acquired his property or interest with notice of such contract or attempted disposition, or on any other ground.

In *Martin* v. *Martin*, *Bell* v. *Martin*, 1831, 2 Ru. & My. 507, Leach, a contract on marriage; in *Waterhouse* v. *Stansfield*, 1851, 9 Ha. 234, and 1852, 10 Ha. 254, Turner, a contract for security; and in *Hicks* v. *Powell*, 1869, L. R., 4 Ch. Ap. 741, Hatherley affirming Giffard, an unregistered conveyance; were held

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to be not enforceable against third parties, because not enforceable against them by the *lex situs*. And in *Norton* v. *Florence Land and Public Works Company*, 1877, 7 Ch. D. 332, Jessel, it was not only held that the question whether a contract for security on foreign land was enforceable against third parties depended on the *lex situs*, but also that the pendency of a suit in the *situs* in which the question might be determined was a conclusive objection to entertaining the claim.

In *Nelson* v. *Bridport*, 1846, 8 Beav. 547, Langdale, an attempt had been made to dispose of foreign immovables by will in a line of settlement, through the device of charging the successor named by the will with a trust. He was compellable to execute the trust as far as was possible consistently with the *lex situs*, being bound *quasi ex contractu* by his acceptance of the succession; but having done so, and having thereby acquired a limited interest which by a change in the *lex situs* was made an absolute one, he was not compellable to employ that absolute interest in executing the trusts any further, but might retain it for himself.

§ 176. Where a money demand is made in a court having personal jurisdiction over the defendant, it is no objection to the demand that it is in any way connected with foreign immovables.

Carteret v. *Petty*, 1676, 2 Sw. 323 note, 2 Ch. Ca. 214, Finch; account of waste between tenants in common of Irish land. *Roberdeau* v. *Rous*, 1738, 1 Atk. 543, Hardwicke; account of rents and profits between tenants in common of land in St. Christopher's. *Bayley* v. *Edwards*, 1784, Thurlow, stated in another case of the same name, 3 Sw. 703; account of produce of land in Jamaica during possession under a will. *Batthyany* v. *Walford*, 1886, 33 Ch. D. 624, North; successor in an Austro-Hungarian fidei-commiss allowed to rank against predecessor's estate in an administration action for what he should establish in Austria-Hungary to be his claim on the balance of the deteriorations and improvements.

Lastly, some points which rather belong to English law in the special sense than to private international law, even as forming a part of English law, may be conveniently mentioned in this chapter.

§ 177. The British sovereign or government must be deemed to be present in every part of the British empire, so that the fact of the sovereign or of a department of government being a necessary party cannot found jurisdiction in England for a suit concerning land in any other part of the empire.

Re Holmes, 1861, 2 J. & H. 527, Wood; *Reiner* v. *Salisbury*, 1876, 2 Ch. D. 378, Malins.

§ 178. In order that one may inherit English real estate, he must

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both be legitimate in accordance with the doctrines of private international law with regard to legitimacy, as to which see above, pp. 88—92, and have been born after an actual marriage between his parents, as distinguished from a marriage antedated by a presumption or fiction of law; that is, he must not have been legitimated *per subsequens matrimonium*, even in a country where such legitimation proceeds on a presumptive or fictitious antedating of the marriage.

Birtwhistle v. *Vardill*, 1826, 5 B. & C. 438; Abbott, Bayley, Holroyd, Littledale: 1830, 2 Cl. & F. 571, 9 Bl. N. R. 32; opinion of judges to same effect delivered to house of lords by Alexander: 1835, 2 Cl. & F. 582, 9 Bl. N. S. 70; opinion of Brougham delivered to the effect that the status of legitimacy is sufficient, Lyndhurst and Denman reserving their opinions, and appeal ordered to be further argued before the judges: 1839, 7 Cl. & F. 895, opinion of Tindal, Vaughan, Bosanquet, Patteson, Williams, Coleridge, Coltman, Maule, Parke and Gurney delivered to house of lords by Tindal, to effect of §: 1840, 7 Cl. & F. 940, judgment of house of lords affirming decision moved by Cottenham, Brougham not opposing though not satisfied. In connection with this great case it will be useful to read the Scotch appeal of *Fenton* v. *Livingstone*, 1859, 3 Macq. 497; Brougham, Cranworth, Wensleydale, Chelmsford.

The doctrine of § 178 has often been represented as an application of the maxim that the *lex situs* governs immovables. By virtue of that maxim, it is said, he who will inherit English land must prove himself heir by the law of England in the special sense, and therefore legitimate by the law of England in the special sense, which law knows nothing of legitimation *per subsequens matrimonium*. Were succession to personal estate in question, he need only prove himself legitimate by the law of England in the larger sense, which, by virtue of the maxim *mobilia sequuntur personam*, refers legitimacy when movables are concerned to the personal law, and so in that case adopts as a part of itself the legitimation *per subsequens matrimonium* which the personal law confers. This is very plausible, but on examination two serious difficulties will be found in it. First, as already pointed out on p. 88, it is thinking in a circle to refer legitimacy to the personal law, since a decision on the legitimacy of the individual is often necessary in order to ascertain his national character or domicile, on which his personal law depends. The question of legitimacy always turns on the legal appreciation of

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various facts, and what alone private international law gives or can give is an appropriate rule for the legal appreciation of each of those facts separately. Next, if it be laid down that when immovable property is under consideration legitimacy is to be referred to the *lex situs*, it follows for the same reason that this can have no other meaning than that all the various facts on which it depends are in that case to be appreciated by the *lex situs*. But then we are led far beyond the question of birth before or after actual marriage. The validity of a marriage even preceding the birth is a necessary element of legitimacy, and this in its turn may depend on the validity of a divorce from an earlier marriage; so we are obliged to ask, where can we stop in applying the *lex situs*? Thus the plausible theory which has been mentioned turns out to be unsatisfactory in its application both to personal and to real estate. Lord Brougham was deeply impressed with the impossibility of stopping at any given point in the application of the *lex situs* to the circumstances on which legitimacy depends, and urged it strongly in *Birtwhistle* v. *Vardill* as a reason for requiring no other quality of legitimacy in an English heir of real estate than that which forms a part of his purely personal status.

The truth appears to be that there neither is, nor with any convenience can there be, any such thing as legitimacy by the *lex situs* or by any one other law; that what private international law gives is, and unless excessive difficulties are raised must only be, a personal status of legitimacy, depending on the total result obtained by appreciating each fact in the case according to the law appropriate to it. And that therefore it is a misleading contrast, when the question is put as between determining legitimacy by this or that law; that the true contrast is between accepting and rejecting the personal status of legitimacy as sufficient when the inheritance of English land is in dispute. *Birtwhistle* v. *Vardill* should therefore be considered as being what the judges seem to have considered it as mainly being, a decision that a special rule of English law requires birth after marriage as an additional condition for such inheritance. In this it is most likely that they were historically accurate, and it is remarkable that d'Argentré gives a general character to a very similar rule.

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Nullus princeps, says he, *legitimat personam ad succedendum in bona alterius territorii*: Comm. in Patrias Britonum Leges, art. 218, gl. 6, no. 20. The rule is not the same, for the canon law on legitimation was too widely received for a rule intended to meet a conflict of laws arising out of its rejection to be framed in such general terms. The context shows that d'Argentré was thinking of the effect of a foreign judicial sentence of legitimacy, but the case is sufficiently analogous. Supposing however that the feudists of all countries were agreed that either a foreign sentence of legitimacy, or a foreign legitimation not arising from any law equally existing in the *situs*, should not entitle any one to succeed to immovables, this, notwithstanding the agreement, would from its nature be only a rule of the special law of each country, and not a rule for choosing between different special laws, or therefore a rule of private international law as we understand it.

The view of the subject here taken furnishes the answer to a question which has been raised in the *Law Quarterly Review*, vol. 5, p. 442. If terms of years in English land are to be treated as immovables for the purposes of private international law (above, § 164), must not legitimacy for the purpose of succession to them be determined by the *lex situs*, and will this be consistent with the rule that for succession to English personalty a child is legitimate who has been legitimated *per subsequens matrimonium* in the country of which the law is held to govern such legitimation (above, § 126)? The answer is that even in the case of English real estate the legitimacy of the heir is not referred to the *lex situs* in the sense intended in the question, but the inheritance is subject to a rule of English law which does not exist for terms of years, so that the latter will go to the legitimated next of kin without violating the rule in § 164.

§ 179. A person who by virtue of § 178 is unable to inherit English real estate is also incapable of transmitting English real estate by inheritance except to his own issue.

Re Don, 1857, 4 Drew. 194, Kindersley.

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CHAPTER IX.

GENERAL NOTIONS ON JURISDICTION.

In the course by which, commencing with Chapter III, we have hitherto travelled through the English doctrines on private international law, we have first considered the status of persons, then the cases which bring prominently forward the conception of various rights of property and obligation as forming a group with the person of their owner as its centre, and lastly rights of property themselves. In other words, we have covered the proper ground of what in the ancient nomenclature of the science are called the personal and real statutes, and we must presently enter on the subject of obligation. Now a statute which disposes of a man's personal condition by reason of his conduct or that of others, as by declaring him married or legitimate by reason of his or his parents' having gone through a certain ceremony, or which disposes of things, including incorporeal rights, on the occasion of such acts or omissions as those which constitute testacy, intestacy, or conveyance, is essentially different from a statute which imposes a duty on the ground of contract or tort. In the former cases, a condition or a thing is disposed of, and although active duties may arise out of the condition, the duty which arises in relation to the thing is merely the negative one of not disturbing the enjoyment of its property by the person in whose favour the law has disposed of it. In the latter case, there is nothing to be disposed of, but the active duty of giving, doing or furnishing—*dare, facere, præstare*—is imposed on the party. The laws which deal with the former cases proceed on the ground of an authority in relation to the condition or the thing, as being physically within the territorial limits of the laws, or as being connected, by widely received traditions or conventions, with the regions

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respectively circumscribed by those limits. The laws which deal with the latter case proceed on the ground of an authority over the agent, including in that term the party who is guilty of an omission to act. But where authority over an agent is concerned, law and jurisdiction are but two aspects of it. We have seen, p. 16, that international rules of law were often deduced from international rules of jurisdiction by force of the maxim *si ibi forum, ergo et jus*. The justification of that proceeding may be put as follows. First, tradition, convention, or the necessity of the case, points out the jurisdiction in which a determination ought most properly to be had, or can only be had effectively; secondly, the persons who are concerned in the determination have not, in general, any reason for claiming that that jurisdiction should follow any law but its own; thirdly, if the matter arises incidentally in another jurisdiction, the certainty which is so important in law requires that it shall be determined as it would be determined in what may be called the primary jurisdiction. This statement suits all the cases, but the second link may be put more strongly in the case of an obligation than in that of a condition or a thing. In the case of an obligation, the matter about which a determination is sought has no existence independent of the law of that which is the primary jurisdiction for enforcing it. That conclusion is involved in the jurisdiction being the primary one. If the authority to which the defendant is rightfully subject under the circumstances does not consider him to be liable, he is not liable, and there is no more in the case. Of course this must be taken with the qualification that rules for the choice of law on questions of obligation may still survive through the force of tradition, although the rules of jurisdiction out of which they arose may have become obsolete, or that such rules of law may have been adopted in countries which never adopted the rules of jurisdiction out of which they arose. Such consequences flow naturally from the recognition of a juridical community of nations, but do not affect the principles on which such a community is based. And the qualifications, no less than the doctrine which they qualify, prove the necessity that before entering on the rules for the choice of a law with regard to obligations, the student should be introduced to the history of the doc-

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trines which have prevailed in Europe about jurisdiction. In that part of the sketch which concerns the Roman system, I shall follow the authority of Savigny, in the eighth volume of his great work on the modern Roman law.

In the empire of Justinian, obligations of whatever nature or wherever contracted might be put in suit in the *forum rei*, the personal forum of the defendant. This was, for an Italian, either that of the *civitas* or *respublica* of which he was a *municeps*,* or that of the place in which he was domiciled. For the whole of Italy was divided into *civitates* having original jurisdiction, of one of which every Italian was a member by municipal citizenship, which involved subjection to the jurisdiction of that community—*forum originis*—although he might be domiciled in another such *civitas* or in a province, and if he were so was subject also to the jurisdiction of his domicile. In principle, the plaintiff had his choice whether to sue in the *forum originis* or the *forum domicilii* of the defendant, but it is likely that by some express provision, now lost, he was precluded from choosing the former except when the defendant was to be found in the territory to which he belonged by *origo*. Even however if this was not so, the plaintiff must generally have preferred the *forum domicilii*, for his own convenience. See above, p. 25.

But since the provinces, being subject to the imperial governors, did not contain *civitates* with original jurisdiction, at least until in late times something of the kind arose in the authority of the *defensores*, a provincial had no other personal forum than his domicile, except so far as he had a *forum originis* at Rome, through the edict of Caracalla which extended the Roman citizenship to all the free subjects of the empire. The Roman citizenship had long before been enjoyed by all Italians, through the *lex Julia*, so that for such of them as did not belong immediately to Rome, but primarily to some other Italian *respublica*, there existed two citizenships, besides a domicile possibly different from either. As to these Italians, and the provincials after the edict of Caracalla, express texts of the Corpus

* *Civis* is only used of a Roman citizen, in opposition to *latinus* and *peregrinus*; but *municeps* is used of every municipal citizen, whether of a *municipium* or of a *colonia*, either being a *respublica*. A *colonia* however is not included in *municipium*.

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Juris show that they could not be sued at Rome in virtue of their citizenship unless actually there, and even then with many exceptions, known collectively as the *jus domum revocandi;* which is the ground for presuming, as above mentioned, that a similar protection existed against all drawing of defendants to answer out of their domicile on the ground of citizenship.

Besides the *forum rei*, the Roman law allowed to the plaintiff the option of suing in the proper jurisdiction of the obligation, for which *forum contractus* and *rei gestæ* are modern terms applied more widely than to the particular cases they would seem to indicate. "This jurisdiction," says Savigny, "is to be held as founded in the following cases:—

"I. At the place which is specially fixed for the fulfilment of the obligation by the intention of the parties, whether it be so fixed by the verbal indication of some place or other," as in the famous law *contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit—Dig.* 44, 7, 21—" or because the act which is to be brought about by the obligation can possibly be performed only at a single place," as in a contract for the sale or lease of land or houses, which implies the delivery of possession.

"II. Failing the appointment of a place of fulfilment, this jurisdiction may be founded by the fact that the obligation arises out of the debtor's course of business, which is fixed at a particular place." * Examples: The *tutela* over persons not *sui juris*, and every kind of *curatela*. The management of another person's affairs: whether of all his affairs, by a general agency or attorneyship, or of a certain class of them, as of a manufacture or commercial undertaking: and whether in consequence of a contract—*operæ locatæ*, or *mandatum* not having for its object a single transient affair; or *quasi ex contractu*, as proceeding from the will of one party only—*negotiorum gestio*, also when not having a single transient affair for its subject. Lastly, one's own regular banking and commission business—*argentaria*. In many cases falling under this second head

* Guthrie. It would be not less accurate, and would suit many of the examples better, to say, as I formerly translated it: "the jurisdiction can be founded on the circumstance that the obligation arises from the transaction by the defendant of affairs connected with a determinate spot."

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the jurisdiction founded on the transaction of affairs coincides with that founded on the domicile, but they may be distinct.

"III. The jurisdiction is also fixed by the place where the obligation arises, if that coincides with the domicile of the debtor." That is, the jurisdiction is then founded on two grounds, and if through the debtor's removing or dying the domicile of his heir or his own new domicile becomes the forum on one of those grounds, he or his heir must still submit to the jurisdiction of the old forum on the other ground.

"IV. The place where the obligation arises can also found jurisdiction even if it be away from the domicile of the debtor, if the circumstances create an expectation that its fulfilment shall also be at the same place."

"Such an expectation is created by one who establishes away from his domicile a commercial business of some duration, and in doing so makes arrangements from which it may be inferred that he will deliver the goods which he there sells in the same place. He thus subjects himself to the special forum of the obligation at the place where the contract is entered into. This is laid down minutely by Ulpian, and that, while warning against the unconditional assumption of jurisdiction merely because a contract is concluded at any place. He justifies this warning by mentioning the case of a person who enters into a contract while on a journey, and of whom it certainly will not be asserted that he subjects himself to jurisdiction at the place of the contract.*

"But such a trading relation is to be regarded only as an example, not as the exclusive condition, of a forum of the obligation. For if contracts are concluded during a residence away from the domicile, it is necessary to deduce from the substance of them what notions as to their fulfilment the parties may probably have entertained. If therefore a public officer in consequence of his official duties, or a deputy to a legislative assembly, stays for months at the same place,

* The reference is to Dig. 5, 1, 19, § 2. *Durissimum est quotquot locis quis navigans vel iter faciens delatus est, tot locis se defendi. At si quo constitit, non dico jure domicilii, sed tabernulam, pergulam, horreum, armarium, officinam conduxit, ibique distraxit, egit, defendere se eo loci debebit,*

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and there contracts debts connected with his daily subsistence, there is no doubt as to the establishment of the special forum of the obligation. So likewise if debts are contracted for similar purposes during a residence at a watering-place. If on the contrary, during such a residence at baths or a watering-place, contracts as to mercantile affairs are entered into of which the further development can be expected only at the domicile, such a jurisdiction at the place where the contract is entered into must be denied. As all here depends on the probable purpose of the parties, a very short residence may in some circumstances suffice to found that jurisdiction. It will be held to exist as against a traveller who refuses to pay his reckoning in a tavern, since in such matters immediate payment is the universal practice, and may therefore be expected by every one. Thus everything depends on the relation in which the nature and length of the residence stand to the substance of the obligation."

"V. If none of these conditions exists, the forum of the obligation is at the domicile of the debtor." Examples: Contracts made by persons travelling, so far as they do not fall under IV. The action for restitution of the *dos*, which must be brought at the husband's domicile, and not at the place where the dotal contract was concluded. The case of a manufacturer who sends round an agent to get orders, for the contract is then fulfilled at the seat of the manufacture by despatching the article, as is shown by the fact that from that moment the Roman law put the article at the risk of the buyer, although the property, requiring delivery for its transfer, did not pass till the arrival of the article at its destination.

"All these cases, however various they appear, and however accidental their connection may seem, yet admit of being reduced to a common principle. It is always the place of fulfilment that determines the jurisdiction, either that expressly fixed (No. I), or that which depends upon a tacit expectation (Nos. II—V). In both cases a voluntary submission of the defendant to this jurisdiction is to be assumed, unless an express declaration to the contrary excludes it."*

* From I, on p. 205, to this point, all is taken or abridged from Savigny, Syst. d. heut. Röm. rechts, § 370. The passages within inverted commas are as in Guthrie's translation, pp. 160—164.

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"The special jurisdiction founded by a delict is unknown to the earlier Roman law, and first arose under the empire. It then found such general acceptance that it was afterwards, even in positive enactments, placed in the same rank as the *forum domicilii, contractus, rei sitæ.* It would be a mistake however to regard this forum as merely a particular form of the forum of the obligation, of the so-called *forum contractus.* For the *forum delicti* does not arise by a presumptive voluntary subjection, and therefore the limitations above laid down for the forum of the obligation do not hold good in respect to this. To found this jurisdiction neither domicile nor any other external accessory circumstance is necessary, but it arises from the commission of the delict itself, even at an accidental and temporary residence. This jurisdiction is thus of a very peculiar character, since it is established not by voluntary but by necessary subjection, which however is an immediate consequence of the violation of right of which the delinquent has been guilty. The jurisdiction of the delict is moreover just as little exclusive as that of the contract, but the plaintiff has always his choice between this special one and the general jurisdiction founded on the domicile of the debtor. . . . .

"The question has been raised whether the forum of the obligation extends merely to those actions which arise out of the natural development of the obligation, and therefore lead to its fulfilment, or also to those which have the opposite direction, seeking the dissolution of the obligation, or to reverse that which has already taken place towards its fulfilment. As a general rule, the first and more limited application of this jurisdiction can alone be admitted. The second and more extensive application can occur only exceptionally, and in the smaller number of cases in which the dissolution of the obligation has a common origin with its beginning, as when the dissolution of an obligation created by contract is derived from a collateral contract added to it. . . . .

"The jurisdiction of the obligation can be made effective only if the debtor is either present in its territory or possesses property there, in which last case the decree against him will be enforced by *missio in possessionem.* By the older Roman law this alternative condition is unquestionable. By the terms of a law of Justinian we might

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regard it as abolished. But this law is expressed so generally and indefinitely, and mixes up the various jurisdictions so indiscriminately, that the intention to change the former law cannot with any certainty be inferred. Hence too a decretal has paid no regard to it, but adheres to the older Roman law, even to the very phrases. The preponderance of modern practice "—Savigny is not speaking of the practice under modern codes or other legislation, but of that under Roman law where still received—" the preponderance of modern practice has followed this opinion, so that the jurisdiction of the obligation cannot be made effectual against an absent person by the mere requisition of a foreign court. It is not to be denied that by this restrictive condition the forum of the obligation loses a great deal of its importance." *

Of the opinions opposed to the above system of Savigny, that which has been most influential in practice is the one, commonly diffused in the middle ages, that the place of contracting an obligation—*locus celebrati contractus*, or *ubi verba proferuntur*—and not that destined for its fulfilment, for the most part determined the special jurisdiction in Roman law. In support of that view some words of Ulpian's were cited: *proinde et si merces vendidit certo loci, vel disposuit, vel comparavit, videtur, nisi alio loci ut defenderet convenit, ibidem se defendere. Dig.* 5, 1, 19, § 2. But this is only the commencement of the passage in the course of which Ulpian warns the reader against the unconditional interpretation of those words, and more fully develops his thought as quoted above, p. 206. Another citation made with a similar purpose was a fragment of the work of Gaius on the *edictum provinciale: At ubi quisque contraxerit. Contractum autem non utique eo loco intelligitur quo negotium gestum sit, sed quo solvenda est pecunia. Dig.* 42, 5, 3. The latter part of this fragment is identical in effect with the law *contraxisse*, quoted above, p. 205; and it must be taken as a commentary explaining the former part, *at ubi quisque contraxerit.* But the whole came to serve the opinion in favour of the *locus celebrati contractus* through treating the former part as laying

* Savigny, Syst. d. heut. Röm. rechts, § 371; Guthrie's translation, pp. 171—174.

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down a rule, and the latter part, with the law *contraxisse*, as merely providing an exception to that rule in the case of an express contract to pay money in a certain spot, *locus solutionis*. The general Prussian law of civil procedure was drawn up in accordance with these ideas, and laid down that the *forum contractus* was at the place, when there was any such, determined by the contract for its fulfilment; if there was none so determined, then at the place where the contract acquired its binding force: part 1, tit. 2, § 149. The opinion however has gained ground that the place of fulfilment, whether determined by the contract or only to be inferred from the nature of the case, furnishes the true forum of the obligation; and the law of civil procedure enacted in 1876 for the German empire establishes it without distinction as the proper alternative to the *forum rei*: § 29.

There was on the continent one great exception to the Roman system. The *forum contractus*, whether *loci celebrati contractus* or *loci solutionis*, was not received in France during the middle ages. The seigneurs had patrimonial rights of administering justice, and in the royal courts the emoluments of justice were considered as forming for the judges a kind of property, on account of the venality of their offices. Consequently the trial in the defendant's domicile, being less the right of the defendant than of the judge, could not be waived by the former, either through his submission when sued elsewhere or through his previous consent in contracting; and both the seigneurs and the royal courts were authorized to reclaim their justiciables, even when the tribunal seized of the cause was incompetent on the ground of domicile alone, being by Roman principles competent in respect of the matter. The disregard of the interest of the parties which was thus shown was covered by a maxim of decorous sound, that since jurisdiction belongs to public law individuals cannot defeat it.* It was only by the ordinance of commerce of 1673 that a *forum contractus* was introduced, and then only in actions within the attributions of the *juges et consuls*, the plaintiff being allowed his choice between the domicile of the debtor, the place where the promise was made and the goods supplied, and that where the payment

* Henrion de Pansey, de l'Autorité Judiciaire en France, 3me édition, t. 1, pp. 370, 371.

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was to be made: tit. 12, art. 17. Art. 420 of the modern code of civil procedure, which applies only to the tribunals of commerce, is substantially a reenactment of the article of 1673; but in those matters which in France are called civil the *forum contractus* is still unrecognized by legislation, except so far as an indirect recognition may be found in the power of a party to an act to elect, by a clause of the act, a domicile for all proceedings relating to it in a place other than his true domicile: Code Nap., art. 111. On the other hand, the Code Napoleon, art. 14, authorizes Frenchmen to sue foreigners in France, even though not residing there, and even on obligations contracted abroad; thus introducing the novel conception of a personal forum of the plaintiff, on the ground that a citizen is entitled to demand justice of his state.

In consequence of the state of things in France with regard to the *forum contractus*, Boullenois points out that the maxim of the *lex loci contractus* did not there possess that which elsewhere was its chief base, and, instead of admitting it as a rule, he prefers to consider separately the motives of decision for each of the cases usually included under it. It has already been noticed—above, p. 17—that a tendency existed among the greater French lawyers to regard a custom less as a law than as a clue to the intention of the parties, and to allow the custom of the *situs* to be ousted by the custom of the domicile introduced by the presumed intention. Very naturally, under the circumstances which have now been mentioned, the custom of the domicile tended to prevail also over that of the place of contract. Thus the Digest says, *si fundus venierit, ex consuetudine ejus regionis in qua negotium gestum est pro evictione caveri oportet:* 21, 2, 6. This was generally understood of the custom of the place of sale, but Dumoulin denied the application of the rule to a vendor and purchaser of one country who happen to contract in another, and considered that the custom of their common domicile, as being that of which they were both aware and which neither can have intended tacitly to reject, should determine the vendor's obligation in the matter.*

* See Boullenois, Traité de la personnalité et de la réalité des Lois, t. 2, p. 456 *et seq.*

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Passing now to our own side of the channel, we find ourselves in the midst of quite a different state of things. At the commencement of legal memory the superior courts already possessed an original jurisdiction coextensive with the realm: there were no such local jurisdictions within England as could require any rules by which to distinguish, on the ground of domicile place of contract or otherwise, the cases which fell under one of them from those which belonged to another. There was indeed room for such considerations in determining what causes the one national or royal jurisdiction would entertain, as contrasted with those which it would hold to belong only to foreign courts, but certain very peculiar doctrines prevented their being much attended to. At common law, it was necessary that the writ by which the action was commenced should be served on the defendant personally and within the realm: hence, if the defendant was out of the realm, there were no means of obtaining a judgment against him on the ground of his domicile or allegiance being English. On the other hand, if the writ was personally served within the realm, a judgment could be obtained against the defendant even though his domicile and permanent allegiance were foreign, probably because the temporary allegiance which even a passing stranger was deemed to owe was regarded as a sufficient foundation for the *forum rei*. Thus domicile, a subject of such importance in the eyes of the Roman, and on the continent of the mediæval lawyer, had no place at all within the purview of the English common lawyer, nor was it taken into account when the processes of distringas and outlawry were applied against defendants on whom personal service could not be effected. And when the writ of subpœna was invented, and the jurisdiction of the court of chancery based on its service within the realm, although the service was allowed to be made either personally or by producing the writ at the defendant's dwellinghouse to some one whose duty it would be to communicate the fact to him, it not being necessary in the latter case that the defendant should be within the realm at the time, yet it was not required that such dwellinghouse should be his domicile. Thus a suit in chancery was free from the necessity of personal service, which had been found so inconvenient in actions at law, but the

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conception of domicile was as far from being entertained as before, either to restrict the power of proceeding against persons casually present or having a dwellinghouse in England, or to found a power of proceeding against persons domiciled in England but neither present nor having a dwellinghouse there.

Not every action however, for which the writ could be served within the realm, could be tried in England. At common law there were rules of venue, that is, of the locality from which a jury ought to be summoned to try a question of fact; and these rules, though perhaps devised for no other purpose than to portion out the business as to which the competence of the superior courts was undisputed, reacted on that competence by limiting it to actions for which a venue could be assigned. The classification of personal actions was into local and transitory. The former were those, such as trespasses to land, of which the causes could not have occurred elsewhere than where they did occur. The venue for actions of this class was the county (including of course the city of London, though not originally a county) in which the cause occurred: hence for local actions it was necessary, besides personal service on the defendant within the realm, that the cause should have occurred in England. Transitory actions were those of which it was said that the cause might have occurred anywhere, as a personal injury or a breach of promise, and for these the venue was said to be arbitrary, that is, the plaintiff might lay the venue in any county he pleased. The real place of occurrence therefore might have been abroad, quite as well as in a different county from that in which the venue was laid, and, if the writ was personally served in England, there was no further condition to satisfy. In chancery as there was no jury there was no venue, and no formal requisite the necessity of complying with which might restrain the competence as to suits even connected with land; and to this cause it may be attributed that at one time the court was far from holding firmly the doctrine expressed in § 178, that its mere personal jurisdiction over the defendant ought not to be made a ground for determining the right to the property or possession of foreign immovables. See above, p. 195.

Legal principle applied spontaneously by the courts appears to

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have modified the original English rules of competence in two ways only. One was the establishment in chancery of the doctrine just referred to: the other was a rule laid down by Eyre and Mansfield at common law, that to prevent a failure of justice a person might be compelled to answer for a local cause of action arising abroad.* But the competence both of the court of chancery and of the courts of common law, with regard to matters and defendants in some way connected with the realm, was extended by statute, or by orders made under statutory authority, at various times from the reign of George the second downwards. To trace the steps of this development would be out of place here, because it was not connected with the growth or reception of the maxims of private international law. The ideas which governed it were not very similar to those which on the continent produced the rules of jurisdiction which in their turn gave birth to rules of law; and, had those ideas been different, the statutory development of jurisdiction in England did not begin till the maxims of private international law had to a large extent been imported. English notions on jurisdiction were in the main unsuitable, and the small portion of them which was not unsuitable came too late, for framing in this country rules of law out of rules of jurisdiction by virtue of the principle *si ibi forum ergo et jus*. The general notions on jurisdiction which have been surveyed in the present chapter will illustrate that process as it took place on the continent, and give an insight into the meaning and scope of the rules of law which resulted from it, a meaning and scope which often clings to them as adopted in England, though it did not arise and indeed could not have arisen here.

* See lord Mansfield's judgment in *Mostyn* v. *Fabrigas*, 1775, Cowp. 161, at pp. 180, 181; also the note beginning on p. 224, below.

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CHAPTER X.

JURISDICTION IN ENGLAND, AND EXTERRITORIALITY.

INDEED, while the detailed history of jurisdiction in England belongs only to the antiquities of English law and not to the subject of this book, because unconnected with the growth or reception of the maxims of private international law, there is another reason why even the present state of jurisdiction in England may seem to have little concern with my subject. It is very common for the courts of a country to entertain actions under circumstances in which they would not admit that the jurisdiction was sufficiently founded to entitle the judgment of a foreign court, pronounced under similar circumstances, to be recognized as internationally binding. For example, the personal forum of the plaintiff introduced by art. 14 of the Code Napoleon—see above, p. 211—and copied in other countries whose legislation is based on that code, is not even in France considered to possess any international validity, and no authority is allowed there to a judgment pronounced in one of those other countries on the ground of it. Hence the true question for private international law in the matter of jurisdiction is not what actions are entertained by the courts of a given country, but in what cases those courts will recognize foreign judgments, which with regard to English practice will be considered in another chapter. The former question is as much one of national law in the special sense as is the question whether the law of any country contains peculiar provisions about aliens. It has however interest enough in connexion with our subject to make it worth while to present here the leading rules of jurisdiction, such as they exist in England under the Rules of the Supreme Court 1883. For fuller details the reader must be referred

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to the usual treatises on the Supreme Court of Judicature, or on the acts and orders which regulate it.

§ 180. Nothing in the acts and orders regulating the Supreme Court of Judicature restrains that court from entertaining any action in which the writ has been personally served on the defendant within the realm, and it must be considered to inherit all the power of entertaining such actions which was possessed by the superior courts of common law and equity. On the other hand, its power of entertaining them has been set free from the restraint of local venue by the following provisions:

"There shall be no local venue for the trial of any action, except where otherwise provided by statute." The plaintiff can choose the place for the trial of his action, subject to alteration by the court or a judge; and where the plaintiff does not choose a place, the trial shall take place in the counties of London and Middlesex, considered for this purpose to be one county, unless the court or a judge shall otherwise order. Order XXXVI of 1883, rule 1, combined with the Local Government Act 1888, s. 89 (3). It is believed that there is not at present in force any statute providing a local venue. See above, p. 213, as to the ancient operation of local venue in limiting the jurisdiction of the courts of common law.

But the personal jurisdiction which the English court claims by virtue of the service of the writ within the realm will be restrained in its exercize by the doctrine of § 173. That doctrine, which was gradually elaborated in the court of chancery, is now acknowledged by the Supreme Court, as will be seen from the authorities cited under the § referred to.

§ 181. "(1) No service of writ shall be required when the defendant by his solicitor undertakes in writing to accept service and enters an appearance. (2) When service is required, the writ shall wherever it is practicable be served in the manner in which personal service is now made; but if it be made to appear to the court or a judge that the plaintiff is from any cause unable to effect prompt personal service, the court or judge may make such order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise, as may seem just." Order IX of 1883,

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rules 1 and 2. Order LXVII, rule 6, is of similar effect to Order IX, rule 2.

The language of Order IX, rule 2, requires some explanation. In §§ 182, 183, 184, we shall see peculiar modes of service given in certain cases. The name "substituted service" however is not used for these, which are regarded as exceptions to the maxim of requiring personal service on defendants, but for the modes of service allowed in cases where that maxim is supposed to apply but real personal service is impracticable; such as by letter, by service at the defendant's late dwellinghouse, with or without advertisement, by service on some one else thought likely to inform the defendant, and so forth. The cases to which the maxim of requiring personal service on a defendant is supposed to apply, and in which therefore the occasion for substituted service may arise, are, so far as persons are concerned:

(1) Those of all persons within the jurisdiction, in cases not falling under § 182, 183 or 184.

Cook v. *Dey*, 1876, 2 Ch. D. 218, Hall.

(2) Those of all British subjects out of the jurisdiction, in cases not falling under § 182, 183, or 184, but falling under § 186.

Bramwell, in *Great Australian Gold Mining Company* v. *Martin*, 1877, 5 Ch. D. 17.

(3) Those of foreigners within the British dominions though not within the jurisdiction. See Order XI of 1883, rule 6, in § 186.

Substitution of notice for service is used in order to bring the writ to the knowledge of a foreign defendant out of the British dominions, in cases not falling under § 182, 183 or 184, but falling under § 186. Service of the writ, instead of notice of the writ, on a foreigner out of the British dominions is a nullity and not an irregularity.

Westman v. *Aktiebolaget Ekmans Mekaniska Snickarefabrik*, 1876, 1 Ex. D. 237; Kelly, Bramwell, Amphlett; decided on the rules of 1875: *Padley* v. *Camphausen*, 1878, 10 Ch. D. 550; Jessel, Baggallay and Thesiger, affirming Hall: *Hewitson* v. *Fabre*, 1888, 21 Q. B. D. 6; Field and Wills.

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So far as matters are concerned, the cases in which personal service or notice substituted for service can be allowed out of the jurisdiction are enumerated below in §§ 186, 187, and perhaps 188; the competence of the court as to defendants out of the jurisdiction cannot be extended beyond these cases and those which may fall under § 182, 183 or 184, by the aid of the rules as to substituted service.

Field v. *Bennett*, 1886, 56 L. J., N. S., Q. B. D. 89; Coleridge and Denman.

Lastly, personal service, service under § 182, 183, or 184, substituted service, and notice substituted for service have all the same effect.

§ 182. "(6) Where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or, at the principal place within the jurisdiction of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm. (7) Where one person, carrying on business in the name of a firm apparently consisting of more than one person, shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there; and if sufficient in other respects, such service shall be deemed good service on the person so sued." Order IX of 1883, rules 6 and 7.

Partners domiciled and resident abroad, carrying on business only abroad, and being foreigners, may be sued under rule 6 if the writ can be served on one of them in England: *Pollexfen* v. *Sibson*, 1886, 16 Q. B. D. 792, Mathew and Smith. But foreigners domiciled and resident abroad cannot be sued under rule 7: *Russell* v. *Cambefort*, 1889, 23 Q. B. D. 526; Cotton, Fry and Lopes; overruling *O'Neil* v. *Clason*, 1876, 46 L. J., N. S., Q. B. D. 191; Coleridge and Pollock affirming Cleasby, which was decided on the equivalent rule of 1875.

§ 183. "Service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the

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dwellinghouse or other conspicuous part of the property." Order IX of 1883, rule 9.

§ 184. "(12) In admiralty actions *in rem*, service of a writ of summons or warrant against ship freight or cargo on board is to be effected by nailing or affixing the original writ or warrant for a short time on the mainmast or on the single mast of the vessel, and on taking off the process leaving a true copy of it nailed or affixed in its place. (13) If the cargo has been landed or transhipped, service of the writ of summons or warrant to arrest the cargo and freight shall be effected by placing the writ or warrant for a short time on the cargo, and on taking off the process by leaving a true copy upon it. (14) If the cargo be in the custody of a person who will not permit access to it, service of the writ or warrant may be made upon the custodian." Order IX of 1883, rules 12, 13, 14.

§ 185. In connection with the last § it may be observed that in actions by seamen, foreign or British, against foreign vessels, though the competence of the British court of admiralty is excluded by the terms of their service, that competence is not thereby ousted, but the court will exercize a discretion as to entertaining the action. It is necessary however before entertaining it that notice be given to the representative of the government of the vessel's country.

The Golubchick, 1840, 1 W. Rob. 143, Lushington: *The Nina*, 1867, L. R., 2 A. & E. 44, Phillimore; L. R., 2 P. C. 38, Romilly: *The Leon XIII*, 8 P. D. 121, 1882 Phillimore, 1883 Brett and Bowen.

§ 186. "1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons"—see § 181 as to the substitution of notice for service—"may be allowed by the court or a judge whenever:

(*a*) The whole subject-matter of the action is land situate within the jurisdiction, with or without rents or profits; or

(*b*) Any act deed or will, contract obligation or liability, affecting land or hereditaments situate within the jurisdiction is sought to be construed rectified set aside or enforced in the action; or

(*c*) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

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(*d*) The action is for the administration of the personal estate of any deceased person who at the time of his death was domiciled within the jurisdiction, or for the execution as to property situate within the jurisdiction of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England; or

(*e*) The action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which according to the terms thereof ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or

(*f*) Any injunction is sought as to any thing to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

2. Where leave is asked from the court or a judge to serve a writ under the last preceding rule in Scotland or in Ireland, if it shall appear to the court or judge that there may be a concurrent remedy in Scotland or Ireland as the case may be, the court or judge shall have regard to the comparative cost and convenience of proceeding in England or in the place of residence of the defendant or person sought to be served, and particularly in cases of small demands to the powers and jurisdiction, under the statutes establishing or regulating them, of the sheriffs' courts or small debts courts in Scotland and of the civil bill courts in Ireland respectively.

3. In probate actions service of a writ of summons or notice of a writ of summons may by leave of the court or a judge be allowed out of the jurisdiction.

4. Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such

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defendant is a British subject or not, and the grounds upon which the application is made: and no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this order.

5. Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given.

6. When the defendant is neither a British subject nor in British dominions, notice of the writ and not the writ itself is to be served upon him.

7. Notice in lieu of service shall be given in the manner in which writs of summons are served."

This is the complete Order XI of 1883, comprizing seven rules, and the following cases relating to its different heads have been decided.

1 (*b*). An action for slander of title to land is not within this head: *Casey* v. *Arnott*, 1876, 2 C. P. D. 24, Grove and Denman; decided on the rules of 1875. Nor is an action for rent: *Agnew* v. *Asher*, 1884, 14 Q. B. D. 78; Coleridge, Mathew and Smith. In Wilson's Practice of the Supreme Court, 7th ed., p. 151, it is said that the court of appeal affirmed this decision on the ground that the plaintiff had not shown that the defendants were assignees of the lease. An action to recover compensation for tenant right according to the custom of the country is within this head: *Kaye* v. *Sutherland*, 1887, 20 Q. B. D. 147, Stephen and Charles.

1 (*c*). As to the domicile or residence of corporations, see below, in the chapter on Corporations and Public Institutions.

1 (*e*). It is not necessary that performance within the jurisdiction be expressly stipulated. On a contract for the transfer of shares, it was held that the obligation to such performance resulted from the duty of delivering the deed of transfer to the transferee, who was resident within the jurisdiction: *Reynolds* v. *Coleman*, 1887, 36 Ch. D. 453, Kay affirmed by Cotton and Bowen. On a contract for machinery to be erected out of the jurisdiction by plaintiffs resident within it, it was held that the order applied because the defendants were bound to send or bring the price to the plaintiffs: *Robey* v. *Snæfell Mining Co.*, 1887, 20 Q. B. D. 152, Stephen and Charles. When a judge is in doubt whether there has been a breach of contract within the jurisdiction, he may make an order for service out of the jurisdiction, at the same time imposing on the plaintiff the condition of recovering at the trial only the amount as to which it shall appear that service out of the jurisdiction was proper: *Thomas* v.

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Hamilton, 1886, 17 Q. B. D. 592; Day, affirmed by Esher, Bowen and Fry, against Field and Butt in the intermediate court.

There is no power under this head to order service out of the jurisdiction on a defendant domiciled or ordinarily resident in Scotland or Ireland; the express exception in rule 1 (*e*) is not reduced by rule 2 to a discretionary exception: *Lenders* v. *Anderson*, 1883, 12 Q. B. D. 50; Grove and Huddlestone, Field agreeing. And substituted service cannot be resorted to in such a case: *Hillyard* v. *Smith*, 1887, 36 W. R. 7, Smith and Charles.

1 (*f*). See *Tozier* v. *Hawkins*, 1885, 15 Q. B. D. 650, Coleridge and Cave; *ib.*, 680, Brett, Baggallay and Bowen. Apparently service under this head would not be allowed if it were shown that there were not, and were never likely to be, any means of enforcing the injunction in England.

1 (*g*). The person within the jurisdiction must be served before an order for service out of the jurisdiction is made under this head: *Lightowler* v. *Lightowler*, 1884, W. N. 1884, p. 8, Butt: *Yorkshire Tannery* v. *Eglinton Chemical Co.*, 1884, 54 L. J., N. S., Ch. D. 81, Pearson. A party may be proper under this head without being necessary, and, subject to the discretion of the court, he will be so whenever, if within the jurisdiction, he could have been made a party under Order XVI of 1883: *Massey* v. *Haynes*, 1888, 21 Q. B. D. 330; Wills and Grantham affirmed by Esher, Lindley and Lopes.

See the orders made under this head in support of an action for enforcing a creditors' deed relating to foreign land: *Jenney* v. *Mackintosh*, above, p. 195; and in support of an action for the administration of the estate of a person domiciled abroad but who left assets in England: *Re Lane*, *Lane* v. *Robin*, 1886, 55 L. T., N. S., 149, Pearson.

2. The discretion enjoined by this rule only applies to cases which do not fall within the exception in rule 1 (*e*): it does not limit that exception. *Lenders* v. *Anderson*, cited above under rule 1 (*e*).

The following cases illustrate the mode in which the discretion enjoined by this rule will be exercized. *Cresswell* v. *Parker*, 1879, 11 Ch. D. 601; James, Baggallay and Bramwell reversing Malins: *Harris* v. *Fleming*, 1879, 13 Ch. D. 208, Hall: two cases on the analogous discretion in the rules of 1875. *Harvey* v. *Dougherty*, 1887, 56 L. T., N. S., 322, Kay; *Marshall* v. *Marshall*, 1888, 38 Ch. D. 330; Cotton and Fry affirming North: *Re Burland's Trademark*, *Burland* v. *Broxburn Oil Company*, 1889, 41 Ch. D. 542, Chitty.

§ 187. "Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the court or a judge, issue a notice, hereinafter called the third party notice, to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons." Order XVI of 1883, rule 48.

It seems that wherever the action is one falling under Order XI (a[illegible], § 186), service out of the jurisdiction of a third party notice may be allowed fr[illegible]

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it, subject to the exceptions with regard to Scotland and Ireland contained in that order: *Dubout* v. *Macpherson*, 1889, 23 Q. B. D. 340, Smith and Day. But the right to indemnity entitling the defendant to issue a third party notice must be under a contract to indemnify: *Speller* v. *Bristol Steam Navigation Company*, 1884, 13 Q. B. D. 96; Brett, Bowen and Fry.

§ 188. Service out of the jurisdiction, whether of a writ or of notice of a writ or of any other proceeding, can now be made only under the rules set out in §§ 186 and 187; no earlier or other practice is applicable. See however the exceptions to this statement which may perhaps result from the cases cited below. It will be observed that under the rules of 1883 the jurisdiction of the court cannot be founded on the committal of a tort within the realm, where the writ cannot be served within the realm, and no injunction is sought as to any thing to be done within the jurisdiction, nor any nuisance within the jurisdiction is sought to be prevented or removed, so as to bring the case under Order XI, rule 1 (*f*). It was otherwise under Order XI, rule 1 (4), of 1875.

Re Eager, *Eager* v. *Johnstone*, 1882 (decided on the rules of 1875) 22 Ch. D. 86, Jessel and Cotton affirming Day; *Weldon* v. *Gounod*, 1885, 15 Q. B. D. 622, Coleridge and Smith; no power for service out of the jurisdiction of a summons in an action to show cause against the appointment of a receiver. *Re Busfield*, *Whaley* v. *Busfield*, 1886, 32 Ch. D. 123, Chitty affirmed by Cotton, Bowen and Fry; no power for service out of the jurisdiction of an originating summons. *Re Brandon*, 1886, 34 W. R. 352, Smith and Grantham; no power for service out of the jurisdiction of a summons for taxation of costs. *Re Anglo-African Steamship Company*, 1886, 32 Ch. D. 348, Kay affirmed by Cotton, Lindley and Lopes; no power for service out of the jurisdiction of orders in the winding up of a company. *Re Wendt*, 1889, 22 Q. B. D. 733; Esher, Fry and Lopes; no power for service out of the jurisdiction of orders in bankruptcy.

That the court would have been competent so far as the *res* was concerned, if the ship could have been arrested within the jurisdiction, is no reason for allowing service out of the jurisdiction: *Re Smith*, 1876, 1 P. D, 300, Phillimore; *The Vivar*, 1876, 2 B. D. 29, Phillimore affirmed by James, Baggallay and Bramwell; *Harris* v. *Owners of Franconia*, 1877, 2 C. P. D. 173, Coleridge, Grove and Denman.

Service out of the jurisdiction cannot be ordered because a fact which occurred out of the jurisdiction has caused damage within the jurisdiction: *Shearman* v. *Findlay*, 1883, 32 W. R. 122, Grove and Mathew; case of a libel published out of the jurisdiction.

Interpleader summonses have been allowed to be served out of the jurisdiction since the rules of 1883 came into force: *Credits Gerundeuse* v. *Van Weede*, 1884, 12 Q. B. D. 171, Pollock and Lopes; *Van der Kan* v. *Ashworth*, W. N. 1884, p. 58. But it has been doubted whether these cases have not been over-

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ruled by the later decisions on the rules of 1883 cited above under this §: Wilson's Practice of the Supreme Court, 7th ed., p. 154.

Proceedings relating to funds in court have been ordered to be served out of the jurisdiction on persons alleged to be or to claim to be interested in them, on the ground of necessity: *Colls* v. *Robins*, 1886, 55 L. T., N. S., 479, Kay; *re Ruddiman's trusts*, 1887, 31 Sol. J. 271, Stirling; *re Gordon's Settlement trusts*, 1887, W. N. 1887, p. 192, Chitty; *re Baron Liebig's Cocoa, &c., Works*, 1888, W. N. 1888, p. 120, North. But in *re Jellard*, 1888, W. N. 1888, pp. 184, 186, where North declined to act on the authority of *re Gordon's Settlement trusts*, Cotton, Fry and Lopes found a way out of the difficulty without deciding the point.

On the same ground of necessity, and drawing a distinction between such a notice and one intended to be the foundation of proceedings, service out of the jurisdiction of a notice of an appointment to settle the list of contributories of a company was allowed in *re Nathan Newman & Co.*, 1887, 35 Ch. D. 1, by Cotton, Lindley and Lopes, reversing North.

§ 189. The rules of 1883 do not "affect the procedure or practice" in certain matters, of which the only one that is important for our subject is described as "proceedings for divorce or other matrimonial causes." Order LXVIII of 1883, rule 1. These continue to be governed by the earlier practice.

In *Trubner* v. *Trubner and Cristiani*, 1889, 15 P. D. 24, Butt, a citation was allowed to be served on a foreign corespondent abroad by inclosing it in a registered letter addressed to him, it being proved that service on him of foreign process by a person at the spot would have given him a right of action by the law of the country where he was living. It will be observed that by the general rules notice of the writ would have had to be given him, but service of the writ on him would have vitiated the proceedings: above, p. 217.

Note on Actions for Trespass to Foreign Soil.

In the case of the *M. Moxham*, commenced in the court of admiralty but heard in the Supreme Court after the fusion, a British ship had damaged by collision a pier on the coast of Spain, and the parties had entered into an agreement that the dispute thence arising should be tried in England; lord justice James observed that, but for such agreement, "very grave difficulties indeed might have arisen as to the jurisdiction of this court to entertain any action or proceedings whatever with respect to injury done to foreign soil:" 1876, 1 P. D. 109. We have seen in § 180 that nothing in the acts and orders regulating the Supreme Court is opposed to such an action, when the writ is served in England: on the other hand there is nothing in those acts or orders that expressly gives the jurisdiction, and the question whether it exists must therefore be decided on a consideration of the powers of the courts from which the Supreme Court inherits.

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In *Skinner* v. *East India Company*, 1665, cited to lord Mansfield in *Mostyn* v. *Fabrigas*, Cowp. 168, the king in council propounded to the judges the question "whether Mr. Skinner," who claimed in respect of damage done in foreign and uncivilized regions, "could have a full relief in any ordinary court of law." And they answered "that his majesty's ordinary courts of justice at Westminster can give relief for taking away and spoiling his ship, goods and papers, and assaulting and wounding his person, notwithstanding the same was done beyond the seas. But that as to the detaining and possessing of the house and islands in the case mentioned, he is not relievable in any ordinary court of justice." Lord Mansfield however mentioned a previous action before himself against Captain Gambier, for pulling down houses in British though uncivilized regions, in which an objection founded on the same citation was made, but a case was produced in which lord chief justice Eyre had overruled the objection; continuing, "and I overruled the objection upon this principle, namely that the reparation here was personal and for damages, and that otherwise there would be a failure of justice; for it was upon the coast of Nova Scotia, where there were no regular courts of judicature, but if there had been Captain Gambier might never go there again; and therefore the reason of locality in such an action in England did not hold. I quoted a case of an injury of that sort in the East Indies, where even in a court of equity lord Hardwicke had directed satisfaction to be made in damages." *Anno* 1775, Cowp. 180. It would seem then that in the opinion of Eyre and Mansfield a local action for a cause arising abroad was admissible in spite of the rules of venue; always, I imagine, supposing that the defendant was either a British subject or resident in England, for otherwise the reason for relaxing the rule of venue would fail, since he might be sued in his own country.

But in *Doulson* v. *Matthews*, 1792, 4 T. R. 503, which was an action for expelling the plaintiff from his dwellinghouse in Canada, Kenyon and Buller decided against the plaintiff solely on the ground of the distinction between transitory and local actions, the wisdom or policy of which Buller said it was too late to question.

In these circumstances it appears that two courses are open. It may be held, on the authority of *Skinner* v. *East India Company* and *Doulson* v. *Matthews*, that actions for trespass to foreign soil were to the last inadmissible in the common law courts, and this merely on account of a rigid rule of venue; and then the conclusion will be that there is nothing to oppose the admission of such actions in the Supreme Court, there being in it no local venue. But it may also be held, on the authority of chief justice Eyre and lord Mansfield, that the objection from venue to actions for trespass to foreign soil had no claim to prevail at common law so far as to defeat the ends of justice; and then the conclusion would probably be that the objection should be dealt with in the Supreme Court on the same substantial grounds on which those judges dealt with it at common law. Either way, it may be inferred that there is not now any absolute impediment in all cases to actions for damage done to foreign soil.

Exterritoriality.

But to the foregoing rules, which determine the actions that will be entertained by the English court, there is a class of exceptions

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that it especially belongs to our subject to notice, because they are not only directly connected with international law, but are also admitted in all countries on similar principles and with the same or nearly the same limits. These are the exceptions made in favour of states, of sovereigns, and of ambassadors or other persons charged with diplomatic missions. They are grounded on the independence and dignity of the states or sovereigns and of the diplomatists who represent them, and on the necessity of preventing the public business the latter have to transact from being impeded by the annoyance and loss of time which lawsuits would occasion; and any violation of the immunities which they create would be regarded as a high breach of public international law. In former times they were carried to an extravagant extent. An ambassador's residence was in most countries an asylum even from criminal justice, and sometimes large franchises were enjoyed by the quarter of the city in which it stood. A fiction, the practical scope of which must not be extended beyond what there is positive authority for in each matter, treated such a residence, and that which a sovereign might occupy while abroad, as forming part of the ambassador's or of such sovereign's country, and therefore as being without the territory in which it lay in fact. And the name of exterritoriality, derived from that fiction, has become attached to the whole class of exceptions from rules of jurisdiction now in question.

From a general point of view it may be said that so far as a state, or a person within the exception of exterritoriality, is liable to be sued at all, there is no *forum rei gestæ*, and the *forum rei* is to be found within the state itself, or in the proper country of the person. But the exception of exterritoriality does not extend to the *forum rei sitæ*, for no country can be expected to renounce the determination of the property in its soil. The doctrines established in England are as follows.

§ 190. Foreign states, and those persons in them who are called sovereigns, whether their title be emperor, king, grand-duke, or any other, and whether their power in their states be absolute or limited, cannot be sued in England on their obligations, whether *ex contractu*, *quasi ex contractu*, or *ex delicto*:

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Except that probably a maritime lien may be enforced in an action *in rem* against a ship belonging to a foreign sovereign in his private character and employed in commerce. This, if it be so, is an exception to the rule, for a maritime action *in rem* is not the less brought against the owners of the ship in question, because all possible owners are concluded by it as well as any parties who may be named or who may appear, or because the writ may be served as mentioned in § 184; nor can the action have any other ground than that of an obligation on the owners, whoever they may be. But there may not be the same objection to suing a foreign sovereign in that manner, and in a matter unconnected with his public character, which there would be to serving on him a writ or notice of a writ.

Maritime liens are not enforceable against foreign ships of war: *The Constitution*, 1879, 4 P. D. 39, Phillimore—a case of salvage, and the immunity extended to a cargo with the care and protection of which the foreign government stated that it had charged itself for public purposes.

In the case of *The Charkieh*, 1873, L. R., 4 A. & E. 59, which was a claim for damage against a ship belonging to the khedive of Egypt and employed in commerce, Sir R. Phillimore decided in favour of the plaintiffs on the grounds that the khedive was neither sovereign nor semi-sovereign, and that even a sovereign would not have enjoyed immunity under the circumstances. In the case of *The Parlement Belge*, 1879, 4 P. D. 129, which was a claim for damage against a public Belgian ship, the same judge decided in favour of the plaintiffs on the ground that she was mainly employed in commerce. But this was reversed by James, Baggallay and Brett, who held that they were precluded from enquiring into the facts of her employment by the declaration of the king of the Belgians that she was in his possession as sovereign and was a public vessel of the state: 1880, 5 P. D. 197. The judgment discusses and condemns the notion that only ships of war, and not all public ships, are exempt from foreign jurisdiction.

The rules as to substituted service cannot be wrested so as to make a British colonial government suable in England: *Sloman* v. *Governor and Government of New Zealand*, 1876, 1 C. P. D. 563; James, Mellish, Baggallay.

§ 191. To the rule laid down in § 190 an exception appears to have existed in the case of a foreign sovereign who was also a British subject. The duke of Cumberland having become king of Hanover in 1837, an ineffectual attempt was made to sue him in this country for what was held both in the court of chancery and in the house of lords to be an act of state. But lord Langdale said "I am of opinion that his majesty the king of Hanover is and ought to be exempt

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from all liability of being sued in the courts of this country for any acts done by him as king of Hanover, or in his character of sovereign prince, but that, being a subject of the queen, he is and ought to be liable to be sued in the courts of this country in respect of any acts and transactions done by him, or in which he may have been engaged, as such subject": *Duke of Brunswick* v. *King of Hanover*, 1844, 6 Beav. 57. On the appeal in the same case lord Brougham remarked "it is not at all necessary to say that supposing a foreign sovereign, being also a naturalized subject in this country, had a landed estate in this country, and entered into any transactions respecting it, as a contract of sale or mortgage; it is not necessary to say that a court of equity in this country might not compel him specifically to perform his contract": 1848, 2 H. of L. 24. And lord Campbell added, "if he," the king-duke, "had been a trustee of a marriage settlement while he resided within this realm, and had become liable in the execution of the trust which he had undertaken and which he was not properly executing, I am by no means prepared to say that the court of chancery would not have had jurisdiction over him": *ib.*, p. 25. But it is now scarcely possible that a foreign sovereign should be also a British subject, for if a British subject accepted a foreign throne he would surely by such acceptance "voluntarily become naturalized" in the state of which he was sovereign, and thereby lose his British nationality in pursuance of the Naturalization Act 1870, s. 6. Nor could a foreign sovereign satisfy the conditions necessary for being naturalized in this country without a special act of parliament, which he could have no motive for seeking, since if he desired to hold land in England he could now do so as an alien. If a foreign sovereign received a conveyance of land in England, and entered into possession of it, it cannot be imagined that a plaintiff, claiming such land by a superior title, would be unable to obtain judgment and delivery in England; or that a mortgagee of English land could not have his usual remedies in England because the mortgagor was a foreign sovereign. The exception of exterritoriality, as above remarked, does not apply to the *forum rei sitæ*; and the court would probably request the foreign office to give the sovereign such information by diplomatic means as would be equivalent to serving

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notice of the writ under Order XI of 1883, rule 1 (*a*) or 1 (*b*). But however it may have been formerly, in the case of a sovereign holding English land as a natural-born or naturalized British subject, it is clear that a foreign sovereign holding such land as an alien could not be compelled by an English court specifically to perform a contract for the sale or mortgage of it.

§ 192. But a foreign state or person entitled to the privilege of exterritoriality, bringing an action in England, will be bound as a private corporation or person would be bound to do complete justice to the defendant with regard to the matters comprized in the action, and will be subject to all cross actions, counterclaims, defences and steps of procedure which as between private parties would be competent to the defendant for the purpose either of obtaining such complete justice or of defending himself against the plaintiff's claim. It was the old maxim of the court of chancery that he who seeks equity must do equity; and Paulus says *qui non cogitur in aliquo loco judicium pati, si ipse ibi agat, cogitur excipere actiones at ad eundem judicem mitti:* Dig. 5, 1, 22.

In *Hullet* v. *King of Spain*, 1828, 1 D. & Cl. 169, Redesdale and Lyndhurst affirming the latter, it was decided that a foreign sovereign might sue in a court of equity. It had been objected that "by no possibility can process be issued with effect, or equity done, or a decree enforced against him"; but Lyndhurst said, "when he sues here as a plaintiff the court has complete control over him, and may hold him to all proper terms." A cross bill was then filed, and it was decided that the king must answer it personally on oath: *King of Spain* v. *Hullet*, 1833, 1 Cl. & F. 333; Plunket, Wynford and Brougham, affirming the latter. In *Rothschild* v. *Queen of Portugal*, 1839, 3 Y. & C. Exch. 594, Alderson, a bill of discovery against a foreign sovereign was allowed in a court of equity, in aid of the defence to an action by her at law. In *Colombian Government* v. *Rothschild*, 1826, 1 Sim. 94, it was held by Leach that a foreign republic must sue in chancery in the name of an official on whom process could be served on the part of the defendant, and who could be called on to answer a cross bill. But it was afterwards established that a republic recognized by the British Government might sue in its own name, and the court would take care that proper means of discovery were afforded: see *Prioleau* v. *United States of America*, 1866, L. R., 2 Eq. 659, Wood; *United States of America* v. *Wagner*, 1867, L. R., 2 Ch. Ap. 582, Chelmsford, Turner and Cairns, reversing Wood, L. R., 3 Eq. 724; *Republic of Liberia* v. *Imperial Bank*, 1873, L. R., 16 Eq. 179, Malins; *Republic of Peru* v. *Weguelin*, 1875, L. R., 20 Eq. 140, Hall; *Republic of Costa Rica* v. *Erlanger*, 1875, 1 Ch. D. 171, James, Mellish and Blackburn, reversing Malins. A foreign government plaintiff ordered to give security for costs: *Republic of Costa Rica* v. *Erlanger*, 1876, 3 Ch. D. 62; James, Mellish

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and Baggallay, agreeing so far with Malins. A foreign sovereign as plaintiff in an action for damage by collision ordered to give security for damages to a defendant bringing a counterclaim, it being impossible to arrest the plaintiff's ship as security: *The Newbattle*, 1885, 10 P. D. 33; Brett, Cotton and Lindley affirming Butt.

The court will take judicial cognizance whether a foreign state, suing in its own name, is recognized by the British Government: *City of Berne* v. *Bank of England*, 1804, 9 Ves. 347, Eldon.

Passing now beyond questions of procedure, the liability of a foreign state or sovereign suing in England, to respect all just defences and to do complete justice to the defendant with regard to the matters comprized in the action, is illustrated by *United States of America* v. *Prioleau*, 1865, 2 H. & M. 559, Wood; *United States of America* v. *Macrae*, 1867, L. R., 4 Eq. 327, Wood, partly reversed by Chelmsford, L. R., 3 Ch. Ap. 79. A government which has succeeded to another must respect all defences which would have been good against that other: *Republic of Peru* v. *Dreyfus*, 1888, 38 Ch. D. 348, Kay.

If the foreign state or person entitled to the privilege of exterritoriality has obtained final judgment in his or its action, the doctrine of this § does not allow what would then be an independent action to be brought against it: *Strousberg* v. *Republic of Costa Rica*, 1880, 29 W. R. 145; Jessel, James, Lush. James said: "if anything has arisen or been discovered since the judgment was obtained which would make it inequitable for the plaintiff to enforce his judgment, the defendant's proper course according to my opinion would be to apply in that action, and not in any fresh action, for the exercize of that jurisdiction which every court always does exercize over its own judgments, to stay any further proceedings upon that judgment on the ground that it is not equitable that proceedings should be taken upon it."

§ 193. In connection with the rule laid down in § 190, a doctrine must be mentioned which may be best introduced by quoting the words of lord Langdale with reference to the court of chancery. "There have been cases in which, this court being called upon to distribute a fund in which some foreign sovereign or state may have had an interest, it has been thought expedient and proper in order to a due distribution of the fund to make such sovereign or state a party. The effect has been to make the suit perfect as to parties, but, as to the sovereign or state made a defendant in cases of that kind, the effect has not been to compel or attempt to compel such sovereign or state to come in and submit to judgment in the ordinary course, but to give the sovereign an opportunity to come in to claim his right or establish his interest in the subject matter of the suit. Coming in to make his claim, he would, by doing so, submit himself to the jurisdiction of the court in that matter; refusing to come in, he might perhaps be precluded from establishing any

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claim to the same interest in another form. So where a defendant in this country is called upon to account for some matter in respect of which he has acted as agent for a foreign sovereign, the suit would not be perfect as to parties unless the foreign sovereign were formally a defendant, and by making him a party an opportunity is afforded him of defending himself instead of leaving the defence to his agent, and he may come in if he pleases. In such a case, if he refuses to come in, he may perhaps be held bound by the decision against his agent." *Duke of Brunswick* v. *King of Hanover*, 1844, 6 Beav. 39.

So far as this doctrine is sound, it applies now to the supreme court; and it certainly is sound as to the first portion, which deals with cases where the court is called on to distribute a fund. The second portion however, which deals with cases where persons have acted as agents for foreign sovereigns, ought to have been expressed in a more guarded manner. If the plaintiff can establish a right in the nature of property or hypothecation to the money or things which the agent holds in his hands within the realm, the matter falls under the same principle as the class of cases in which the court has to distribute a fund. There is in fact a fund within the jurisdiction, the rights in which the court cannot refuse to declare and carry into effect, without a denial of justice similar in kind to that which would take place if the court refused to deliver land to one claiming it by a title superior to that of a foreign sovereign, or to foreclose a mortgage of land against a foreign sovereign. And there would be this further circumstance in favour of exercizing the jurisdiction, that it would be unnecessary to sue the foreign sovereign, because the movables could be reached through the agent, who would be protected against his principal by the judgment. But if the plaintiff only claims by virtue of an obligation alleged to exist on the part of the foreign sovereign or state, he can no more pursue that claim indirectly through the agent than he could do so directly; and he is defeated by the refusal or omission of the foreign sovereign or state to appear and consent to be bound.

Attempts were made in the following cases to apply the latter part of lord Langdale's doctrine, as quoted in § 193; but in none of them was relief ultimately obtained, it being held in all that no right in the nature of property or hypothecation to the money or things in the agent's hands had been established.

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Smith v. *Weguelin*, 1869, L. R., 8 Eq. 198, Romilly: *Larivière* v. *Morgan*, decided in favour of the plaintiff by Malins and on appeal by Hatherley, 1872, L. R., 7 Ch. Ap. 550, but reversed on further appeal, 1875, L. R., 7 E. & I. A. 423, by Cairns, O'Hagan and Chelmsford: *Twycross* v. *Dreyfus*, 1877, 5 Ch. D. 605; Hall, affirmed by Jessel and James. In *Gladstone* v. *Musurus Bey*, 1862, 1 H. & M. 495, Wood, the plaintiffs obtained an interim injunction against the Bank of England as stakeholders, but the case is not traceable further. In *Gladstone* v. *Ottoman Bank*, 1863, 1 H. & M. 505, Wood, the plaintiffs did not rely on any right to money or things in England, but attempted in vain to restrain the Ottoman Bank from enjoying in Turkey the benefit of an act of state of the Turkish sultan, which they alleged was in violation of their rights. They must have equally failed, as the judge pointed out, if they had made a similar complaint of a British act of parliament. In *Strousberg* v. *Republic of Costa Rica*, 1880, 29 W. R. 125, Jessel and James repeated lord Langdale's doctrine as to funds in the hands of persons within the jurisdiction, but not further.

In *Vavasseur* v. *Krupp*, 1878, 9 Ch. D. 351; Jessel, affirmed by James, Brett and Cotton; a foreign sovereign was allowed to remove certain shells, which were his property, out of the country, notwithstanding that the plaintiff claimed to have them destroyed in protection of his patent, infringed by the sovereign's agent.

§ 194. "All writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by her majesty her heirs or successors, or the domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained seized or attached, shall be deemed and adjudged to be utterly null and void to all intents constructions and purposes whatsoever." St. 7 Anne, c. 12, s. 8.

"Provided and be it declared that no merchant or other trader whatsoever within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by this act." Ib., s. 5.

This is the statute passed in consequence of the Russian ambassador having been taken from his coach and imprisoned by a private suitor, and its third section, above quoted, has always been deemed to be merely declaratory of the common law. So far indeed as concerns an ambassador or public minister himself, the immunity extends further than is expressed in that section. Not only is his person

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privileged from arrest, and his goods or chattels from seizure, but he cannot be sued at all, even for the purpose of obtaining against him a judgment which may be enforced by execution after he has ceased to be entitled to the privilege.

Magdalena Steam Navigation Company v. *Martin*, 1859, 2 E. & E. 94; Campbell, Wightman, Erle, Crompton.

Nor can he be made a defendant as representing his sovereign or state, with the view of giving him an opportunity to appear and defend the rights of such sovereign or state when they may be adjudicated on pursuant to lord Langdale's doctrine quoted in § 198.

Gladstone v. *Musurus Bey*, 1862, 1 H. & M. 495, Wood.

Nor, when a foreign sovereign or state is made a defendant in such a case as last mentioned, can the writ be served on the ambassador or minister as a means of bringing it to the knowledge of such sovereign or state.

Stewart v. *Bank of England*, 1876, W. N. 1876, p. 263, Jessel.

If the ambassador or minister has submitted to the jurisdiction, he may be too late in applying to have his name struck out or the proceedings against him stayed, especially if he is being sued jointly with others: but even then the statute will have to be respected as to the execution of any judgment against him.

Taylor v. *Best*, 1854, 14 C. B. 487, Jervis and Maule.

So far as concerns the servants mentioned in the statute, the following quotations illustrate the principles of decision.

"To constitute a person domestic servant it is not essential to show that he resides in the house, but if you had shown that this party was a chorister, and in such a situation that the Bavarian ambassador required his attendance from time to time in order to assist in the performance of the religious service of the embassy, I should consider that he was on this ground entitled to some of the privileges of a domestic servant": Bayley, in *Fisher* v. *Begres*, 1832, 1 C. & M. 124. Bolland spoke to the same effect, adding, what no doubt Bayley also meant, "if such person attends at the chapel": ib., p. 127. "Although he says

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that he is liable to be called on at any time, he does not show that he has ever actually been called upon by the ambassador to perform any services": Bayley, in *Fisher* v. *Begrez*, 1833, 2 C. & M. 243. In *Poitier* v. *Croza*, 1749, 1 W. Bl. 48, the alleged service to the Sardinian envoy was not proved.

The servant may live in a separate and suitable house, his goods in which will be privileged; but where he kept a lodginghouse, his goods in it were liable to be distrained for poor rates: *Novello* v. *Toogood*, 1823, 1 B. & C. 554; Abbott, Bayley and Holroyd.

By the term "domestic," which is distinguished in the statute from "domestic servant," any person belonging to the family or suite of the ambassador or minister must be understood. And it is the doctrine of public international lawyers, though no occasion for applying it seems yet to have arisen in England, that the privilege accorded to the family suite and servants is that of the ambassador or minister, who may waive it for them, unless indeed they have not been appointed by him but by his sovereign or state, but who cannot waive his own privilege, because it concerns the dignity of his government and the convenient transaction of its affairs.

The privilege applied to secretaries and attachés: *Hopkins* v. *De Robeck*, 1789, 3 T. R. 79, Kenyon, Ashhurst and Grose; *Parkinson* v. *Potter*, 1885, 16 Q. B. D. 152, Mathew and Wills.

Where an ambassador, minister, or member of an embassy or legation is a subject of the country to which the mission is accredited, he enjoys the privilege of exterritoriality so far as the government receiving the mission has not expressly excluded it in its reception of the person in question.

Macartney v. *Garbutt*, 1890, Times of 25 Feb. 1890, Mathew.

§ 195. Consuls and their family and servants are not entitled to the benefit of § 194. But it must be remembered that in Eastern countries consuls have a diplomatic character.

Barbuit's Case, 1738, Forrester's Cases temp. Talbot, 281, Talbot.

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CHAPTER XI.

TORTS.

When damages are claimed in respect of what is alleged to be a tortious act or omission, the selection of a law by which to decide is free from all question about the voluntary submission of the parties to the law of any country, such as arises in cases of contract, because there has been no dealing in which the parties have concurred. Another contention may be made, suggested by or imitated from what takes place in contract, namely that the defendant has voluntarily submitted himself to the law of the country in which he has acted or omitted to act, either by the very act or omission, or if he does not belong to that country by having entered it. But such reasoning would prove too much, for it would equally cut all the knots of private international law by referring every question to the special laws of the country where the fact which gave rise to it occurred. The truth is that by entering a country or acting in it you submit yourself to its special laws only so far as legal science selects them as the rule of decision in each case. Or more truly still, you give to its special laws the opportunity of working on you to that extent. The operation of the law depends on the conditions, and where the conditions exist the law operates as well on its born subjects as on those who have brought themselves under it. The international law of torts may therefore best be considered independently of the ideas suggested by contract, and previously to that part of the subject.

Starting from the fact that according to the general notions on jurisdiction the *forum delicti* and the *forum rei* are equally competent in cases of tort, we have to enquire which of them is the primary

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jurisdiction; not in the historical sense, in which we have seen on p. 208 that the *forum rei* is the older, but in the sense of being the more appropriate, and therefore of not being obliged to take any law but its own into consideration. (See page 203.) The *forum delicti* appears to be entitled to that rank, because the injured person may fairly desire the quickest and easiest redress without having to follow the wrongdoer to his own country; also because one of the main objects of law is to maintain the peace within a given territory, and therefore to afford judicial redress for such conduct as in the absence of it would tend to provoke a breach of the peace. But if the plaintiff choose the *forum rei*, can he claim that the decision there shall be the same as it would have been in the *forum delicti*? It will probably be found that to secure certainty is the leading motive for following in other jurisdictions the law which would have been applied in the primary one; but this means certainty in the mutual dealings of men, and the motive has little application to the case of a tort where necessarily there has been no such dealing. A law which gives damages for a wrong must proceed on grounds of justice or public expediency, and if the personal law of the defendant refuses damages which the *lex loci delicti commissi* would give, the former, in adopting the latter, would receive a shock that may well be thought to outweigh in importance the disappointment which a refusal would cause to the plaintiff, even supposing that he has not had an opportunity of suing the defendant with effect where the act complained of was done. On the other hand, if the personal law of the defendant would give damages for what the *lex loci delicti commissi* regards as a justifiable act, the defendant may plead that if his act disturbed the social order of any country it was that of the country where it was committed, the law of which therefore is the best authority on the subject.

This reasoning tends to the conclusion, which we shall see has been adopted in England, that the *lex fori* and *lex loci delicti commissi* must concur in order that an act or an omission may be deemed tortious. On the continent there is no general agreement. Savigny maintains the exclusive authority of the *lex fori*, "both positively and negatively, that is, for and against the application of a law which

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recognizes an obligation arising out of a delict." * His reason is that all laws relating to delicts have such a close connection with public order as to be entitled to the benefit of what I have called the reservation in favour of a stringent domestic policy: above, p. 89. M. Charles Brocher, on the contrary, maintains the authority of the *lex loci delicti commissi* in terms which would appear to be exclusive, were it not that he goes on to claim for the judge the right of taking considerations of public order into account; and the result at which he would practically arrive would probably not be very different from that which prevails in England.†

§ 196. No act can be treated in England as a wrong on the part of any defendant in whom it is not a wrong by the law of the country where it was done, whether that law did not regard him as a wrong-doer at the time, or whether he has since been enabled to justify it in that country by the enactment of an indemnity.

It was decided in *Regina* v. *Lesley*, 1860, Bell C. C. 220; Erle, Wightman, Williams, Watson, Hill; that a justification under the sovereign authority of the place where the fact was committed is a sufficient answer to a criminal prosecution for assault and false imprisonment abroad.

For civil purposes the second case put in the §, which carries the first with it *a fortiori*, was decided in an action for damages against a late governor of Jamaica, whose proceedings in time of insurrection had been covered by a colonial act of indemnity: *Phillips* v. *Eyre*, 1869, L. R., 4 Q. B. 225; Cockburn, Lush, Hayes; affirmed 1870, L. R. 6 Q. B. 1; Kelly, Martin, Channell, Pigott, Cleasby, Willes, Brett. Cockburn, delivering the judgment of the court below, said; "it appears to us clear that where by the law of another country an act complained of is lawful, such act, though it would have been wrongful by our law if committed here, cannot be made the ground of an action in an English court": u. s., p. 239. And Willes, delivering the judgment of the appeal court, said; "the act must not have been justifiable by the law of the place where it was done": u. s., p. 29. In *Hart* v. *von Gumpach*, 1873, L. R., 4 P. C. 439, Montague Smith, an action for damages incurred by an alleged libel in China, which failed because there was a sufficient defence by English law, the question was noticed and reserved, whether proof that the communication was privileged by the law of China would have been a sufficient defence (pp. 464, 5). We must conclude that it would have been so. In the *M. Moxham*, 1876, 1 P. D. 107; James, Mellish, Baggallay; reversing Phillimore, 1875, ib. 43; a British ship by negligent sailing damaged a pier on the coast of Spain, and it was said that by Spanish law the master and mariners were liable, but not the ship or her owners. It was held that if that were so

* Syst. d. heut. Röm. rechts, § 374; Guthrie's translation, p. 254.

† Nouveau Traité de Droit International Privé, p. 315.

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the latter would not be liable in England. "Whatever is a justification in the place where the thing is done ought to be a justification where the cause is tried," had already been said incidentally by lord Mansfield in *Mostyn* v. *Fabrigas*, 1775, Cowp. 175. "In their lordships' opinion the general principle of criminal jurisprudence is that the quality of the act done depends on the law of the place where it is done": Mellish, delivering the judgment of the privy council in *Att.-Gen. of Hong Kong* v. *Kwok-a-Sing*, 1873, L. R., 5 P. C. 199.

Dobree v. *Napier*, 1836, 2 Bing. N. C. 781, Tindal and (?), was an action against a British admiral in the Portuguese service, for damages incurred through the seizure of a British ship in Portuguese waters for breach of blockade and carriage of contraband during a civil war in Portugal. The ship was condemned by a Portuguese court as lawful prize, and the English court gave its judgment in favour of the admiral on the ground that that sentence was conclusive proof of her having been rightly taken. The case is sometimes quoted in support of the doctrine of the present §, but the fact of the capture having been made in Portuguese waters is only noticed as a part of the answer to the argument that the defendant's Portuguese service was a breach of the foreign enlistment act.

§ 197. Neither can any act be treated as a wrong in England which is not such in the defendant by the principles of English law, notwithstanding that the defendant is liable by the law of the country where the act was done. But "the English court admits the proof of the foreign law . . . as one of the facts upon which the existence of the tort, or the right to damages, may depend"—"as in the case of a collision on an ordinary road in a foreign county, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed"—"and it then applies and enforces its own law so far as it is applicable to the case thus established."

The passages which in the § are placed between inverted commas are taken from the judgment of the court in *The Halley*, 1868, L. R., 2 P. C. 193, Selwyn (pp. 203, 4). It was there held that the compulsory employment of a pilot was a sufficient answer on the part of the shipowner to a claim for damages occasioned by a collision which, through the pilot's fault, took place in the territorial waters of a country by the law of which compulsory pilotage furnishes no such defence: reversing Phillimore, 1867, L. R., 2 A. & E. 3. But this does not apply where the captain is compelled to take a pilot, but not to give up the navigation of the ship to him: *The Guy Mannering*, 1882, 7 P. D. 132, Coleridge and Cotton, affirming Phillimore, 7 P. D. 52; *The Agnes Otto*, 1887, 12 P. D. 56, Butt. See further as to compulsory pilotage in § 204.

See *Batthyany* v. *Walford*, 1886, 33 Ch. D. 624, North,—quoted above under

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§ 176 in which it was treated as an element of the decision that the liability of the successor for waste was sanctioned in principle by the English law in analogous cases.

§ 198. But the last § must be understood without prejudice to this, that an act may be treated as a wrong in England which is not such in the defendant by English law otherwise than as adopting some rule of public international law.

In *The Nostra Signora de los Dolores*, 1813, Dodson 290, Scott, a part owner of a privateer was held liable for her acts, although by English law in the narrower sense he would not have been so liable because his name did not appear in her register.

§ 199. If an act is not justifiable by the law of the country where it was done, and damages can be recovered for it consistently with the principles of English law, it is no answer to a civil action in England that by the *lex loci delicti commissi* civil proceedings are not allowed to be taken for the act in question unless criminal proceedings accompany or have preceded them, for this is a matter which relates to the form of the remedy and is therefore governed by the *lex fori*.

Scott v. *Seymour*, 1862, 1 H. & C. 219; Pollock, Martin, Wilde; affirmed by Wightman, Williams, Crompton, Willes, Blackburn.

§ 200. But what if an act be not justifiable by the law of the country where it was done, and yet damages are not recoverable for it at all by that law, although the principles of English law would grant them? This question is not likely to arise in criminal cases where real pecuniary damage is done, because the law of England is not more liberal than other laws in granting civil remedies as well as criminal ones for such wrongs. But there are countries, as France, in which no damages are allowed to be claimed on the ground of illicit intercourse, the investigation which would arise being thought hurtful to public morality; and there are probably countries in which redress of a penal nature, but not by way of damages, may be obtained for slight assaults or other personal injuries not resulting in real pecuniary loss. The question was suggested by the pleadings in

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Scott v. *Seymour*, but was not properly raised by them, and the point was consequently discussed there but not decided.

Wightman thought that an action would lie in this country by one British subject against another for an assault committed where the redress that could be obtained was only penal and not by way of damages, but Williams was not prepared to assent. Blackburn doubted whether in such circumstances no damages would be "recoverable for an assault however violent," but was "disposed to think that the fact of the parties being British subjects would make no difference." 1862, 1 H. & C. 234, 5, 7. Lord Mansfield said in *Mostyn* v. *Fabrigas*: "if two persons fight in France, and both happening to be casually here one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here, because, though it is not a criminal prosecution, it must be laid to be against the peace of the king; but the breach of the peace is merely local, though the trespass against the person is transitory. Therefore, without giving any opinion, it might perhaps be triable only where both parties at the time were subjects . . . . Can it be doubted that actions may be maintained here not only upon contracts, which follow the persons, but for injuries done by subject to subject?" 1775, Cowp. 176, 179. Since the peace of the king was admitted by Mansfield to be local, it is not in it that he can have seen the reason for thinking that actions for injuries done by subject to subject might be more favourably considered than other actions for injuries done abroad; and as it is not now necessary to mention such peace in the pleadings of a civil action, it need not be further discussed in this connection. In a case in which the English court would entertain an action for divorce by the husband, it can scarcely be supposed that the corespondent could escape paying damages on the ground that the adultery was committed in a country where they are not recoverable for it, if at least it was committed at a time when the English domicile or residence on which the jurisdiction for divorce is founded (above, §§ 40, 41) already existed. Such adultery would be an injury to a conjugal relation deemed to be entitled to protection in the English court. But then the damages in respect of it, being merely an incident in the proceeding for divorce, could scarcely be drawn into precedent in support of a recovery in an independent action for an injury done abroad. It is probably the better opinion that no such independent action would lie where damages were not granted by the *lex loci delicti commissi* whether the parties were British subjects or not, there being no family relation that could claim the protection of English law, and no civil right acquired by the plaintiff in the primary jurisdiction.

§ 201. So far as the doctrines stated or considered in the previous §§ do not interfere, an action for tort may be brought and an injunction granted even against a foreigner who is in England.

Caldwell v. *Vanvlissengen*, 1851, 9 Hare 415. Turner.

A provision has in modern times been widely adopted in different

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countries by which, in collisions at sea, the liability of shipowners for damage done by their ships without their actual fault or privity is limited to the value of the ship and freight. After some enactments applicable only to particular cases, this limitation was first fully adopted in the United Kingdom by the st. 53 Geo. 3, c. 159, s. 1, which did not name any class of ships or owners, so that its effect as to foreign ships and owners was left to legal reasoning; but after our legislation had remained in that state for about half a century the Merchant Shipping Amendment Act 1862, s. 54, expressly limited the liability of "the owners of any ship, whether British or foreign," to a certain pecuniary amount per ton of her tonnage. English courts will therefore in future have little occasion to reason out the measure of the liability of foreign shipowners on legal principle, but in a treatise on Private International Law the question of principle cannot be ignored. The general law maritime, with which we had to make acquaintance in considering the property in movables (above, pp. 173—176), being the aggregate of those maritime rules which at a remote period were prevalent in most European countries, of course knew nothing of such a limitation as is here referred to, for at that period shipowners were liable without limit by the laws of their respective countries. What view then will be taken by those who are in the habit of appealing to "the general law maritime as it is administered in England"? The subject had best be introduced by the case of the *Carl Johan*, in which the measure of damage where the laws of the colliding ships are different had to be considered by lord Stowell.

The *Carl Johan*, 1821, Stowell, is not reported, but is cited in *The Dundee*, 1 Hagg. Adm. 113, and in *The Girolamo*, 3 Hagg. Adm. 186. It was a case of collision between a British and a Swedish ship, the latter being at fault, and the limitation of the owner's liability did not exist by Swedish law but had been recently established in British law by the 53 Geo. 3. It was therefore almost a matter of course that the Swede could not defend himself by the British statute, which was neither his personal law nor the *lex loci delicti commissi*. Lord Stowell is stated to have held "that the new rule introduced by the 52 [read 53] Geo. 3 was one of domestic policy, and that with reference to foreign vessels it only applied in cases where the advantages and disadvantages of such a rule were common to them and to British vessels; that if all states adopted the same rule there would be no difficulty, but that no such general mutuality was alleged; that if the law of Sweden adopted such a rule it would apply to both countries,

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but that Sweden could not claim the protection of that statute without affording a similar protection to British subjects in similar cases": 3 Hagg. Adm. 187, from Dr. Arnold's notes. It will be observed that in the above lord Stowell, speaking with reference to the actual state of British law, says that Swedish owners would enjoy the benefit of a similar limitation if it existed by their law. He does not expressly say that if there were no limitation by British law, Swedish owners would yet enjoy the benefit of one existing by their law; but he is stated to have held that the statute "was a law as to British ships, but not as to foreign ships nor for foreign owners" (1 Hagg. Adm. 113), on which footing it is not easy to see how its presence or absence could make any difference to the liability of a Swedish owner. There remains to be considered what we have seen that lord Stowell said about mutuality, and on the whole his position was probably this, that the presence or absence of a British statute could make no difference to Swedish liability, but that if a country possessing such a limitation for itself did not allow British owners the benefit of it in its courts, he would be justified on a principle of retorsion in not giving that country the benefit of its limitation in his court.

Thus there is nothing in what has been reported from lord Stowell that except from the point of view of retorsion can impugn the § which, on principle, is next submitted.

§ 202. On principle, in cases of collision at sea, the owners of the delinquent ship may plead a limitation of their liability to the value of the ship and freight when it is accorded to them by the law of their flag. This follows either from considering the law of the delinquent ship as the *lex loci delicti commissi*, in accordance with the fiction by which a ship is deemed to be a part of the territory indicated by her flag, or from holding that there is no local law, and that therefore the defendants are subject to no obligation not imposed on them by their personal law. But the owners of the delinquent ship cannot plead a limitation of liability to the value of the ship and freight which is accorded by the law of the plaintiffs' flag but not by that of their own flag.

§ 202A. But between lord Stowell's time and that of the Merchant Shipping Amendment Act 1862, the English courts were disposed to adopt the following doctrine:—The owners of a British ship in collision with a foreign ship are liable only as by British statute law, but the foreign owners of a foreign ship in collision with a British one outside territorial jurisdiction, though liable under their own law only to the same extent as by British statute law, are subject in England to an unlimited liability by virtue of that branch

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of English law which is called the general maritime law as administered in England. [Of what is so called it was correctly said by the court of appeal in *Lloyd* v. *Guibert*, L. R., 1 Q. B. 125, that it is, "to avoid periphrasis, the law of England." See also lord justice Brett, in *The Gaetano and Maria*, 7 P. D. 148.]

The first case in which this doctrine appears is probably *Cope* v. *Doherty*, 1858, 4 K. & J. 367, Wood; affirmed 1858, 2 D. J. 614, Knight-Bruce and Turner; in which it was held that the British limitation of liability did not apply to a collision between two American ships more than three miles from the British coast, and Wood said that if it had been averred and proved that the American law was the same as ours he would have been competent to apply it as between Americans, but must still have refused the limitation of liability to the delinquent Americans as against any British partowners of the American ship which was sunk. The judgments of Wood and Turner discuss elaborately and reject the application of the British act of parliament to *limit* the liability of the foreign owners of foreign ships on the high seas, a point which might have been expected not to cause much difficulty, but the vicechancellor did not advert to the question what authority would have *imposed* the liability to British owners in the case which he put. Knight-Bruce declined to say what would have been his opinion "if one only of the two ships had been British in ownership and character, or if the collision had happened in a British river or a British port." The case put by Wood and reserved by Knight-Bruce arose in *The Wild Ranger*, 1862, Lush. 553, Lushington, where an American ship had caused damage to a British one by collision on the high seas, and the American limitation of liability was pleaded. Dr. Lushington refused to admit the limitation, founding himself on the general law maritime, his opinion as to which we have seen above in relation to the transfer of the property in movables.

In *General Iron Screw Collier Company* v. *Schurmanns*, 1860, 1 J. & H. 180, Wood, the British limitation of liability was applied in favour of a British ship against a Dutch one, the collision having taken place within three miles from the coast of England. In *The Amalia* (*Cail* v. *Papayanni*), 1863, 1 Mo. P. C., N. S., 471, judgment affirming Lushington pronounced by Chelmsford, the British limitation of liability was applied in favour of a British ship against a Belgian one, the collision having taken place in the Mediterranean. Both these cases are in accordance with § 202.

It is interesting to enquire out of what order of ideas such a doctrine as that of § 202A can have arisen, so strange as it must seem to those who regard the laws administered by courts of justice as based on sovereignty over persons and territories. Some light may be thrown on the question by a remark of Dr. Lushington when delivering judgment in *The Zollverein*, a case on the rule of the road at sea. He said: "as regards the foreign ship, for her owner cannot be supposed to know or to be bound by the municipal

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law of this country, the case must be decided by the law maritime, by those rules of navigation which usually prevail among nations navigating the seas where the collision takes place; if the foreigner comes before the tribunals of this country, the remedy and form of proceeding must be according to the *lex fori*:" Swabey's Adm. Rep. 99. In "comes before the tribunals of this country" the learned judge must have meant to include "is brought before," which was the case in *The Zollverein*, and will usually be the case where the limitation of the foreigner's liability is in question. And by speaking of the law maritime as the *lex fori* he showed himself to be aware that notwithstanding that specious name it was British law he was really applying to foreigners, giving us perhaps at the same time the clue to his reasoning, namely that as soon as any particular court of admiralty is recognized as competent to entertain the litigation, its law becomes applicable on the ground of the maxim *si ibi forum ergo et jus*. But that maxim only applies in favour of the court to which any litigation most properly belongs: above, p. 16. And to any one penetrated with the idea that all regular authority in the civilized world is either over persons or over places, it would seem to follow that on the high seas the only regular authority, whether for the enactment of law or for the establishment of normal jurisdiction, must be that of sovereigns and states over (1) their subjects or members, (2) foreigners on board ships rightly carrying their respective flags, (3) pirates; that what is done on the high seas can produce legal effects in accordance with this principle alone; and that though the presence of a ship in a port may give to the local court a *forum rei sitæ*, carrying with it the right of applying to the thing the legal effects of what may have taken place beyond the jurisdiction, it cannot carry that of determining those effects by the law of the court. It must however be admitted that the deduction anciently drawn from the non-territorial character of the high seas was not that no state could exercize regular authority on them without special justification, but that every state could. For instance, it was thought a regular exercize of authority that a belligerent should stop neutrals on the high seas, though not committing even any constructive offence against him by carrying con-

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traband of war or violating a blockade, and take the property of his enemy out of their possession. So one cannot help suspecting that the application of the law of a particular country, under the name of the law maritime, to torts committed by foreigners outside its territory was a survival of the view that the high seas are a field for the exercize of universal and indiscriminate jurisdiction. Indeed this is confessed in what was said by lord justice Brett in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company:* "inasmuch as the rule of exclusive jurisdiction cannot apply, it seems to me that if a foreigner in this country can be served with a writ for an act of his servants done on the high seas, which are as much within the jurisdiction of England as they are within the jurisdiction of any other country, an action can be maintained in a court of common law": 10 Q. B. D. 587.

The reader will not confound the claim to bind foreigners by a law maritime existing in a British court of admiralty with lord Stowell's reference to the law of nations, as affording ground for believing that the British parliament did not intend to relax the liability of British subjects to foreigners, in such a case as that of *The Nostra Signora de los Dolores*, 1813, 1 Dods. 290, 298. See above, § 198.

§ 203. The conflicting principles of §§ 202 and 202A apply to a law by which, in any country, liability for damage wholly occasioned by the negligence of the master or mariners is imposed on them to the exclusion of the owners. If § 202 is adopted as to the measure of the owners' liability, it must follow that the very existence of their liability must also depend on the law of their flag. If § 202A is adopted, the foreign owners will be liable in England, although freed by their own law.

In *The Leon*, 1881, 6 P. D. 148, Phillimore, Spanish owners were held to be subject to liability in England for damage caused on the high seas wholly by the negligence of the master or mariners, notwithstanding the existence in Spain of such a law as mentioned in the §.

§ 204. In cases of collision at sea, the compulsory employment of a pilot will exempt the owners in an English court from liability for

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damage caused by his fault, whatever be the flags and the laws of them. This agrees with the principle that no act can be treated as a wrong in England which is not such in the defendant by the principles of English law: see § 197.

The Christiana (damage done by foreign ship in the Thames, but no distinction as to the liability founded on the place), 1828, 2 Hagg. Adm. 183, Robinson: *The Vernon* (damage done by British ship to foreign one), 1842, 1 W. Rob. 316, Lushington.

In *The Neptune the Second*, 1814, 1 Dods. 467, Scott, and *The Girolamo*, 1834, 3 Hagg. Adm. 169, Nicholl, the collisions occurred in British territorial waters, and foreign ships were held liable notwithstanding compulsory pilotage. In the latter case the fault was held to be that of the master himself, so that there was no necessity for objecting to the decision in *The Christiana*, as the learned judge does on p. 188. In the former case the compulsory character of the pilotage is not referred to, and it is therefore possible that Sir W. Scott may have doubted whether the pilotage could strictly be called compulsory, which was another point adverted to by Sir J. Nicholl in *The Girolamo*.

§ 205. When two ships are in danger of collision at sea, the rule of the road to be followed by each is that which is common to their flags, or if at the time no rule is common to their flags, then the old rule which was once common to them.

The question about the application of the British statutory rule of the road at sea differs considerably as well from that about the application of the British statutory limitation of liability to the value of the ship and freight, as from that about the application of the British statutory exemption from liability on the ground of compulsory pilotage. From the nature of the case, any rule of the road at sea must apply to both or neither of the ships which are approaching each other, while there is no impossibility in the different parties to a collision being bound by different laws with regard to the existence of liability as depending on other considerations than the rule of the road, or with regard to the measure of liability supposing it to exist. See the quotations in § 197 from the judgment of the privy council in *The Halley*. Also it is a fact, and not a hasty generalization, that there was once a rule of the road at sea common to all the maritime populations of Europe. When therefore the legislature either of the United Kingdom or of any other country alters its rule of the road, it must be presumed, in the absence of expression, to intend that the

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old rule shall be left standing even for its own subjects, under all circumstances in which the other party to a possible collision is not subject to the new rule and the legislature in question could not claim to impose it on him.

In *The Dumfries*, 1856, Swabey 63, Lushington held that the old rule, and not the British statutory one, applied as between a British and a Danish ship. The decision was reversed on the facts, 1856, Swabey 125, judgment of the privy council delivered by Patteson; the Dumfries being held to have been in the wrong, even supposing the act of parliament applied, as to which no opinion was given. In *The Zollverein*, 1856, Swabey 96, Lushington, a Russian ship was not allowed to defend herself against a British one by the latter's violation of the British rule. In *The Chancellor* (*Williams* v. *Gutch*), 1861, 14 Mo. P. C. 202, Romilly, the inapplicability of the British rule as between a British and an American ship was conceded. In *The Repeater* v. *The Braga or Krageroe*, 1865, 14 L. T., N. S., 258, Kelly, the court of admiralty of Ireland applied the British rule as between a British and a Norwegian ship, the latter being bound by virtue of a convention between the king of Norway and the queen.

In *The Eclipse and The Saxonia* (*Hamburgh American Steamship Company* v. *North of Scotland Banking Company*), 1862, 15 Mo. P. C. 262, Lush. 410; judgment affirming Lushington delivered by Romilly; the British statutory rule was held not to apply as between a British and a foreign vessel in collision at sea within three miles from the coast of England, not even in the Solent, between the Isle of Wight and the mainland of Hampshire.

§ 206. Where the defendant has tortiously had the use of the plaintiff's money or property in a given country, interest on the value must be allowed according to the rate of that country, and judgment given for the sum which will produce the amount in that country at the rate of exchange.

Ekins v. *East India Company*, 1718, 1 P. W. 395, Cowper: affirmed, 1718, 2 Bro. P. C. 382. See below, §§ 225 and 226.

After the slave-trade had been prohibited by British legislation, but while there were still countries which had not prohibited it, a class of cases used to arise out of injuries done at sea by British officers to subjects of those countries, in the course of attempts to suppress slavetrading by them. The actions were held to lie, because the old rule of public international law permitting the slave-trade remained in force in favour of such plaintiffs, and was to that

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extent a rule of English law; so that the case fell under § 198, and was not inconsistent with the doctrine submitted in § 202, that where there is no local law a defendant can only be liable according to his personal law.

Madrazo v. *Willes*, 1820, 3 B. & Al. 353; Abbott, Bayley, Holroyd, Best.

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CHAPTER XII.

CONTRACTS.

We now come to the doctrines accepted in England on that part of private international law which relates to contracts, and they may be entered on without further preface than what has been said in Chapter IX as to the general theory of jurisdiction and its relation to law, and what has been said in Chapter II as to modern continental doctrines on the *Forms of acts, other than judicial ones*, and the *Intrinsic validity and effects of contracts*.

Formalities of Contracts.

§ 207. Subject to § 208, the formalities required for a contract by the law of the place where it was made, the *lex loci contractus celebrati*, are sufficient for its external validity in England.

Guépratte v. *Young*, 1851, 4 De G. & S. 217, Knight-Bruce. See above, on p. 70, that learned judge's approval, exceptional for England, of the principle of the *lex loci actus*.

§ 208. But a contract, although externally perfect according to the law of the place where it was made, cannot be enforced in England unless evidenced in such manner as English law requires.

This doctrine is based on the maxim that the *lex fori* governs procedure, but it is far from being universally received abroad, the evidence of a contract being often deemed undistinguishable from its form. Indeed to say that a contract may be validly made without writing, but that it cannot be enforced unless evidenced by writing, appears to be a distinction without a difference, at least when the law of only one country is considered. The distinction may begin to

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have a meaning when two legal systems are considered, as in this §, though even then the truth will be that while the *lex loci contractus celebrati* deems the contract to be both valid and enforceable, the *lex fori* ignores it altogether. The opinion of Boullenois was that the mode of proof, as for example whether by oral testimony or by writing, depended on the law of the place of contract, as being part of the *vinculum obligationis;* * and the provision of the Italian code to the same effect may be seen above, p. 38. Savigny says: "The authority of merchants' books as evidence is to be judged according to the law of the place where the books are kept. Their probativeness indeed appears to belong to the law of process, and hence to be properly subject to the *lex fori*. But here it is inseparably connected with the form and effect of the juridical act itself, which here must be regarded as the preponderating element. The foreigner who deals with a merchant belonging to a place where mercantile books are probative subjects himself to its local law." † This reasoning might be admitted so far as to receive the evidence of such books on the strength of the *lex loci contractus;* and to do so would simply amount to regarding the merchant who made the entry in his book as constituted by the *lex loci contractus* the agent of the other party, empowered to reduce the contract for him into writing in a certain way. But it would still remain that if oral evidence were offered which the *lex fori* excluded, such exclusion, being founded on the desire of preventing perjury, might claim to overide any contrary rule of the *lex loci contractus*, not only on the ground of its being a question of procedure, but also because of that reservation in favour of any stringent domestic policy which controls all maxims of private international law.

Evidence by writing must be furnished, where required by the 4th section of the statute of frauds, though the *lex loci contractus celebrati* does not require it. *Leroux* v. *Brown*, 1852, 12 C. B. 801; Jervis, Maule, Talfourd.

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* Traité de la personnalité et de la réalité des Loix, t. 2, p. 459.

† Syst. d. heut. Röm. rechts, § 381; Guthrie's translation, p. 322. "The juridical act" means only "the transaction," which is so called because it is of a nature to produce legal consequences.

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§ 209. The formalities required for a contract by the law of the place where it was made, the *lex loci contractus celebrati*, are also necessary for its validity in England.

"The plaintiff cannot recover upon a written contract made in Jamaica, which by the laws of that island was void for want of a stamp." This is the marginal note of *Alves* v. *Hodgson*, 1797, 7 T. R. 241, in which Kenyon said: "then it is said that we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made, and unless it be good there it is not obligatory in a court of law here." In *Bristow* v. *Sequeville*, 1850, 5 Exch. 275; Pollock, Rolfe, Alderson, Platt; there was no question of proving the contract, but only of proving that the case provided for by the contract had arisen through the fact of a certain payment having been made, and a receipt was allowed to be used as evidence which could not have been so used where it was given for want of the stamp required in that country. The case therefore rested on the maxim that the *lex fori* governs procedure, and did not raise the point of this §. But Rolfe said: "the marginal note of *Alves* v. *Hodgson* is perfectly correct, although I cannot help thinking that there must be some mistake in the report of the case. . . . . I agree that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here. But if that case meant to decide that where a stamp is required by the revenue laws of a foreign state before a document can be received in evidence there, it is inadmissible in this country, I entirely disagree." And Alderson said: "if by the law of a foreign country a document is only inadmissible for want of a stamp, it is a valid contract, and receivable in evidence in another country." There need be no doubt about the accuracy of the report of *Alves* v. *Hodgson*, lord Kenyon, as above quoted from it, points out so clearly that the question to try was whether there was an obligation by the *lex loci contractus celebrati*, and implies so clearly that such an obligation was equally absent whether the promissory note by which, if at all, it was constituted, was called void or inadmissible by that law. Grant that certain evidence may be read, it misses the mark if it only proves that a certain transaction took place, and not that an obligation arose on that transaction by the appropriate law.

"I should clearly hold that if a stamp was necessary to render this agreement valid in Surinam, it cannot be received in evidence without that stamp here. A contract must *be available* by the law of the place where it is entered into, or it is void all the world over. Ellenborough, in *Clegg* v. *Levy*, 1812, 3 Camp. 167. An annuity granted in England, and secured on land in Ireland, was void in Ireland if it did not comply with the formalities required by the English annuity act: *Richards* v. *Goold*, 1827, 1 Molloy 22, Hart, who said that "a contract void *by operation of law* in the place where it is made cannot be set up in any other place." I have underlined the words in these judgments which are inconsistent with limiting the inefficacy in England to those contracts which are expressly declared void by the *lex loci contractus celebrati*.

In *James* v. *Catherwood*, 1823; Abbott, Holroyd, Best; receipts given in France, and inadmissible there for want of a stamp, were admitted in order to prove the loan of money. The only reason given was that no notice can be

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taken of the revenue laws of a foreign country, a reason of which Pollock appeared to approve when he quoted the case in *Bristow* v. *Sequeville*. To impose on the defendant an obligation which he never incurred by the appropriate law of the transaction, on the ground that he would have incurred it if a foreign revenue law had not stood in the way, is something more than not to notice a foreign revenue law. But in the particular circumstances of *James* v. *Catherwood* proving a contract of loan was perhaps not indispensable. If the defendant detained the plaintiff's money without lawful excuse, there might be an obligation on him by the law of England to restore it, no matter where he received it; and so the case, like *Bristow* v. *Sequeville*, might be reduced to the proof of a fact.

In *Wynne* v. *Jackson*, 2 Russ. 352, a dictum of Leach is reported, "that the circumstance of [certain] bills being drawn [in France], in such a form that the holder could not recover on them in France, was no objection to his recovering on them in an English court." It has been assumed in quoting this dictum that the objection of form was the want of a stamp, but it does not appear to have been so, for it is said that the bills were not "in the form required by the French code." The dictum is therefore quite indefensible, and the case appears to have been ultimately decided both by the vicechancellor, and by Eldon on appeal (1826), on the ground of the consideration for which the bills had been given.

See the exception which Romilly made to the doctrine of this § in *Van Grutten* v. *Digby*, above, p. 71, with what I have there said. See also, in §§ 227, 228, the rules enacted by the Bills of Exchange Act 1882 as to the forms required in bills of exchange, particularly the non-necessity of the foreign stamp, which makes those instruments an exception to the doctrine here contended for, supposing that doctrine to be sound in general.

§ 210. There is an authority to the effect that a formality, which in the place where the contract was made is an accident without consequence, must have in England the effect which English law would give it.

A contract executed under seal in India, where there is no difference between specialty and simple contract debts, is a specialty in England, and the longer period of limitation applies to it. *Alliance Bank of Simla* v. *Carey*, 1880, 5 C. P. D. 429; Lopes.

Interpretation of Contracts.

Supposing that a contract satisfies the conditions required with regard to its formalities, it has next to be interpreted, that is, it must be ascertained what the parties meant by the words they have used; then a question may arise whether the meaning of the parties was not prevented by some rule of law from producing

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a binding obligation, and therefore, in our subject, a question by what national law the legality of a contract is to be determined; and lastly, if the contract is found to be a lawful one, it will often happen that the parties have expressed no meaning about the particular consequences of it which are under discussion, whence arises in our subject the question by what national law the unexpressed consequences of a contract are to be drawn from it.

On interpretation in private international law there is little to be added to what is said above, pp. 71, 72: see also pp. 132—136.

§ 211. "Where a written contract is made in a foreign country and in a foreign language, the court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art, if it contains any; thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any peculiar rules of construction, if any such rules exist by the foreign law. With this assistance, the court must interpret the contract itself on ordinary principles of construction." Lord Cranworth, in *Di Sora* v. *Phillipps*, 1863, 10 H. of L. 633. It will be observed that in this passage no rule is laid down as to what law is applicable to the case, supposing, for example, that persons belonging to one country contract in a second for the performance of certain things in a third. It is not pretended by the learned lord that the law of any of those countries, as such, would govern the interpretation. A consideration of all the facts might lead to the conclusion that words had been used by the parties in the technical sense of this or that law, or it might lead to the conclusion that they had not agreed in any meaning on the point under discussion. And in the latter case the result might be either that there was no obligation on the point, or that an obligation on the point followed, by some law as such, from another point on which the parties had agreed in a meaning. But in every case the interpretation of their meaning would be a question of fact, as it is put above, on p. 71. It is true that in the same case, p. 638, lord Chelmsford is reported to have said: "it is difficult to understand how the construction of a contract can be a question of fact." But he only desired to say that it was not a question to which a witness could be

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allowed to depose; that the witnesses could only depose to the more elementary facts which were to guide the court in interpreting the contract for itself. The words which immediately follow in the report—"the construction of a contract is nothing more than the gathering of the intention of the parties to it from the words they have used"—are equivalent to stating that the question is one of fact in the sense here meant. And although lord Chelmsford added—"if the law applicable to the case has ascribed a peculiar meaning to particular words, the parties using them must be bound by that meaning"—the value of that rule can scarcely extend beyond the case in which the whole transaction, and the persons and things concerned in it, belong to a single territory. To apply it further would require the possession of a rule for the selection of a law on interpretation, which it would be a bold undertaking to furnish.

In *Duncan* v. *Campbell*, 1842, 12 Sim. 616, Shadwell, a deed executed in Scotland, and in Scotch form, was under the circumstances interpreted according to the technical sense of the words in English law.

Intrinsic Validity and Effects of Contracts.

Supposing that a contract satisfies the conditions required with regard to its formalities, and that it has been interpreted so far as the meaning of the parties has been expressed in it, there remain the questions which have been described on p. 253 as those of its legality and unexpressed consequences, and on p. 35 as those of its intrinsic validity and effects. Another term which is sometimes used, the obligation of a contract, will include them all. At this point begins the competition between the *lex loci contractus celebrati* and the law of the place of fulfilment, intending by the latter the law of that jurisdiction which would be the *forum contractus* according to true Roman principles. The dicta of the English judges are mainly on the side of the former, which at the time when the maxims of private international law were imported into this country was almost universally preferred on the continent, under the influence of mistaken views as to the *forum contractus* in Roman law. Also

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the *locus contractus celebrati* and the *locus actus* being the same, our judges, who were little acquainted with the principle of the *lex loci actus*, were led to refer to the *lex loci contractus celebrati* that operation with regard to the formalities of contracts, and even with regard to their interpretation, so far as any one might be disposed to attribute a binding authority to the technical sense of words, which elsewhere was perhaps more often referred to the *lex loci actus*; and they were thereby confirmed in their adherence to the *lex loci contractus celebrati* where it no longer ran parallel to the *lex loci actus*, but competed with the law of the place of fulfilment. But the reasons which plead for the law of the place of fulfilment as in general determining the obligation of a contract are so substantial, resting as they do on the general probability that it is there such obligation will be discussed and enforced, that the English judges have often abstained from actually giving to the place of contracting that paramount influence which their dicta ascribe to it.

Thus no dictum in favour of the place of contract can be stronger than that of lord justice Turner, in delivering the judgment of the privy council in *The Peninsular and Oriental Steam Navigation Company* v. *Shand*, 1865, 3 Moo. P. C., N. S., 290. "The general rule is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is of course immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations." Yet the same judge immediately proceeded as follows. "Their lordships are speaking of the general rule; there are no doubt exceptions and limitations on its applicability, but the present case is not affected by these, and seems perfectly clear as to the actual intention of the contracting parties. This is a contract made between British subjects in England, substantially for safe

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carriage from Southampton to Mauritius. The performance is to commence in an English vessel, in an English port; to be continued in vessels which for this purpose carry their country with them; to be fully completed in Mauritius; but liable to breach, partial or entire, in several other countries in which the vessels might be in the course of the voyage. Into this contract, which the appellants frame and issue, they have introduced for their own protection a stipulation, professing in its terms to limit the liability which according to the English law the contract would otherwise have cast upon them." According to the French law, in force at Mauritius, a stipulation so limiting the company's liability would be ineffectual; but the privy council held, reversing the judgment pronounced at Mauritius, that it was effectual in the case. "The actual intention of the parties," said Turner, "must be taken clearly to have been to treat this as an English contract, to be interpreted according to the rules of English law; and as there is no rule of general law or policy setting up a contrary presumption, their lordships will hold that the court below was wrong in not governing itself according to those rules."

Now let us consider what was involved in the case, and in the judgment as above cited. When a contract was entered into which expressly purported to limit the liability of the company, there could be no serious question but that the parties intended to limit the liability of the company. The real question was whether that intention was lawful, and therefore effectual, and this depended on whether the law of England or of Mauritius was to govern: nor was any step really gained by pointing out that the parties, so far as they thought of either law, must have intended to adopt the one which would make their contract good, because the lawfulness of this second intention would remain as open to question as that of the intention to limit the liability of the company. The court at Mauritius held that the law of that island governed because it was the place where the carriage contracted for was to end, and in that sense the place of fulfilment. The privy council decided in favour of the law of England, but neither substantially nor nominally on the bare ground of its being that of the place of contract, notwith-

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standing the strong dictum with which they commence. Substantially, they point out that the fulfilment of the contract was to be the whole carriage, and not merely its termination, and they refer to the English character of the company by calling the contract one made between British subjects: nominally, they build on the presumed intention of the parties to adopt English law. Now if the reader will turn to Savigny's examination of the *forum contractus* above, pp. 205, 206, he will see that the case did not fall under I, because among all the places over which the fulfilment was to extend none was specially fixed, but that it fell under II, by reason of the obligation arising out of the company's course of business in England, and also under III, by reason of the English character of the company; and that therefore, for reasons agreeing with the substantial grounds of the privy council, England was the Roman *forum contractus*. And as to the nominal ground, it may be confidently believed that if it had been the English law which prohibited the limitation of the company's liability, and the French which allowed it, the decision of the privy council would still have been in favour of the English law, and nothing would have been said about the intention of the parties to adopt the law which made their contract good.

And dicta of English judges are not wholly wanting on the side of the place of fulfilment, as against that were the contract was made. In *Robinson* v. *Bland*, 1760, lord Mansfield said, "the law of the place can never be the rule where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed:" *Burr.* 1078. The question was about the lawfulness of the consideration for a bill of exchange drawn by a person in one country on himself in another; and as the law of the latter country was opposed to a recovery on the bill, and there was nothing but the place the bill was drawn on from which to infer a view to that law, lord Mansfield can have meant by "an express view" to it nothing special to the case, but merely that tacit expectation which may always be said to be directed to the place of fulfilment, even when the result of appealing to that place is to defeat the specific intentions of the parties.

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§ 212. Under these circumstances it may probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such.

The most important English cases with relation to this § that have been decided since the appearance of my second edition, in which it stood as § 201, are *Jacobs* v. *Credit Lyonnais*, 12 Q. B. D. 589; 1883, Denman and Manisty; 1884, Brett and Bowen; and *Re Missouri Steamship Company*, 42 Ch. D. 321; 1888, Chitty, affirmed in 1889 by Halsbury, Cotton and Fry. Both fulfil the forecast in the § by proceeding on substantial considerations rather than on any rigid rule in favour either of the law of the place where the contract was made or of that of the place of fulfilment; and in both the law chosen was in fact that of the Roman *forum contractus* as explained by Savigny, a circumstance which is highly satisfactory as rendering it more than probable that the same conclusions would have been arrived at in the courts of most of the leading countries in the world. But it must be admitted that in both cases a stress was laid by the learned judges on the intention of the parties, as the governing element in the choice of a law, which is not in accordance with the discussion preceding the §, and which, where the lawfulness of the intention is itself in question, as it was in *re Missouri Steamship Company*, I still find it difficult to reconcile with the logical order to be followed.

But before coming in detail to the cases in which some other country may compete with the place where the contract was made as the truest seat of the transaction in question, it will be convenient to take the cases in which the *lex fori* competes with the law prevailing in the unquestioned seat of the transaction.

§ 213. A contract which is illegal by its proper law cannot be enforced. This follows from the consideration that no obligation can be imposed by the *lex fori* as such, that is, when the forum is not the proper forum of the transaction.

Heriz v. *Riera*, 1840, 11 Sim. 318, Shadwell.

A number of cases have decided that the law of England does not regard it as wrong to violate the laws of a foreign country concerning revenue or trade, and that therefore a contract of which the proper law is that of England may be enforced notwithstanding that it contemplated such a violation. *Planché* v. *Fletcher*, 1779, 1 Doug. 251, Mansfield and ?: *Lever* v. *Fletcher*, 1780, Park on Marine Insurances, 8th edn. p. 506, Mansfield: *Simeon* v. *Bazett*, 1813, 2 M. & S. 94, Ellenborough and ?; affirmed, 1814, *sub. nom.* *Bazett* v. *Meyer*, 5 Taun. 824, Thomson and ?: *Sharp* v. *Taylor*, 1849, 2 Ph.

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801, see p. 816, Cottenham. The justice of this doctrine need not here be considered, because even if admitted it would not lead to the conclusion that a contract can be enforced here which produced no obligation by its proper law, when the cause of such invalidity was the violation of the trade or revenue laws of the country concerned. This however was done in *Boucher* v. *Lawson*, 1735, Cases temp. Hardwicke 85, Hardwicke, Page and Lee; unless that case can be supported on the ground that a contract to carry from one country to another properly belongs to the latter country. See § 222.

It may here be mentioned that a contract having for its object to revolutionize a friendly country, or to supply funds to an insurgent government not recognized by the sovereign of these realms, will not be enforced in England. *Jones* v. *Garcia del Rio*, 1823, T. & R. 297, Eldon: *Biré* v. *Thompson*, mentioned by Shadwell in *Taylor* v. *Barclay*, 2 Sim. 222, Eldon: *Macnamara* v. *D'Evreux*, 1824, 3 L. J. Ch. 156, Leach: *De Wütz* v. *Hendricks*, 1824, 9 Moore 586, 2 Bing. 314, Best: *Thompson* v. *Powles*, 1828, 2 Sim. 194 —*sub. nom. Thompson* v. *Barclay*, 6 L. J. Ch. 93—Shadwell: *Taylor* v. *Barclay*, 1828, 2 Sim. 213, Shadwell. The last case shows that the court will take judicial notice of the fact that the insurgent government has not been recognized, notwithstanding that the contrary is averred in the pleadings. When in any pleadings a state is mentioned which has not been recognized by the sovereign of these realms, and it may possibly be not an insurgent one but a new state in a region previously uncivilized, the party averring its existence must prove it: *Macgregor* v. *Lowe*, 1824, 1 C. & P. 200, Ry. & Mo. 57, Abbott.

§ 214. Where a contract contemplated the violation of English law, it cannot be enforced here notwithstanding that it may have been valid by its proper law.

Biggs v. *Lawrence*, 1789, 3 T. R. 454; Kenyon, Ashurst, Buller, Grose; all however grounding their opinion on the fact that three of the partners who sued lived in England at the time the contract was made: *Clugas* v. *Penaluna*, 1791, 4 T. R. 466, where there was a sole plaintiff, resident in the country of the contract, but a British subject; on which fact Kenyon grounded his opinion, and possibly Grose, while Ashurst and Buller took the broad ground expressed in the §: *Waymell* v. *Read*, 1794, 5 T. R. 599, Kenyon, Buller and Grose; where the plaintiff was not a British subject, and the doctrine of the § was finally adopted. It had been laid down by lord Mansfield in *Holman* v. *Johnson*, 1775, Cowp. 341, but could not be applied either there or in *Pellecat* v. *Angell*, 1835; Abinger, Bolland, Alderson, Gurney; because the delivery of the goods sold was complete abroad, and nothing was done by the seller to assist in smuggling them into England, though he knew the buyer's intention to do so. In the cases before lord Kenyon the seller packed the goods in a peculiar manner, for the purpose of smuggling.

In *Santos* v. *Illidge*, 1859, 6 C. B., N. S., 841; and on appeal, 1860, 8 C. B., N. S., 861; the action was by a Brazilian against British subjects, for non-delivery of slaves sold by them in Brazil, and the question was whether they had been prohibited from selling them by a British act of parliament. If they had, the contract did not contemplate the violation of British law, but was in

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actual violation of it, and there could of course be no recovery on it in England. It was held incidentally by Bramwell and Blackburn that a right of property acquired in Brazil to slaves there, through a purchase made there and lawful there, must be recognized in England as a valid Brazilian right, capable of existing and being transferred in that country, even though the purchaser, being a British subject, should be held to have committed felony under a British act of parliament in acquiring it: 8 C. B., N. S., 873, 876. Blackburn however thought the point would be questionable "if the vendor was a domiciled British subject." The doctrine, perhaps even without this limitation, seems plain enough; but the contrary was held by Willes, Williams and Byles in the lower court, and by Wightman and Pollock in the higher court.

§ 215. Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law.

The plaintiff in such a case encounters that reservation in favour of any stringent domestic policy, with which alone any maxims for giving effect to foreign laws can be received: see above, pp. 39, 40. § 214 may be referred to the same principle, but the cases in which a breach of English law is contemplated may usefully be kept distinct from those in which English law declines for other reasons to aid a contract. The difficulty in every particular instance cannot be with regard to the principle, but merely whether the public or moral interests concerned are essential enough to call it into operation; and where a breach of English law is not contemplated, this is necessarily a question on which there is room for much difference of opinion among judges.

Suppose an action to be brought here for money won at play, or lent for the purpose of play, where the *lex loci contractus* gives a right of action. In *Robinson* v. *Bland*, 1760, Burr. 1077, Mansfield gave no opinion on the point, no difference between the law of England and the *lex loci contractus* being established; but Denison and Wilmot thought the law of England would in any case prevent the recovery. In *Quarrier* v. *Colston*, 1842, 1 Ph. 147, Lyndhurst held that the law of England would not prevent the recovery. In *Wynne* v. *Callander*, 1826, 1 Russ. 293, Gifford, bills accepted abroad for money lost at play in England were held not to be enforceable here, but it does not appear whether this was on the ground of the domestic policy of the *lex fori*, or on the ground of the *lex loci contractus* of the consideration for the bills.

The English court will not enforce an agreement between husband and wife which contained a stipulation for facilitating proceedings in England for divorce, or, where the parties are British subjects though domiciled abroad, a stipulation as to the custody of the children which they could not have entered into by English law, even though the objectionable stipulations have been

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carried into effect: *Hope* v. *Hope*, 1857, 8 D. M. G. 731, Knight-Bruce and Turner; in which case, 1856, 22 Beav. 351, Romilly had held that the rest of the agreement might be enforced if the objectionable stipulations had been carried into effect.

A contract relating to an English litigation being impeached on the ground of champerty, the law of England condemning it prevails over the *lex loci contractus* supporting it. *Grell* v. *Levy*, 1864, 16 C. B., N. S., 73; Erle, Williams, Willes, and ?.

If a contract, so far as it affects trade in England, is open to the objection which lies by English law against contracts in undue restraint of trade, it cannot be enforced here notwithstanding that it is valid by the *lex loci contractus*: *per* Fry, in *Rousillon* v. *Rousillon*, 1880, 14 Ch. D. 351, at p. 369.

We now come to the cases in which the competition is not between the *lex fori* and the law prevailing in a place which is the unquestioned seat of the transaction.

§ 216. Contracts relating to immovables are governed by their proper law as contracts, so far as the *lex situs* of the immovables does not prevent their being carried into execution.

Campbell v. *Dent*, 1838, 2 Mo. P. C. 292, Lushington. See also above, § 163.

§ 217. Contracts impeached as violating monopolies.

Pattison v. *Mills*, 1828, 1 D. & Cl. 342 (and *sub nom. Albion Insurance Company* v. *Mills*, 3 W. & Sh. 218), Lyndhurst: contract made by a company sustained on ground of *lex loci contractus*, notwithstanding that in the company's country the contract would have been illegal because of a monopoly enjoyed there by others.

§ 218. Contracts for service.

A contract for service belongs, so far as the liability of the hirer is concerned, to the country where it is made and in which the hirer lives, and not to that in which the service is to be rendered.

This was Best's opinion, at *nisi prius*, on the question of liability to interes *Arnott* v. *Redfern*, 1825, 2 C. & P. 88.

A barrister's right to sue and recover payment for his services depends on the law affecting his bar, and not on that of the place where he is retained or of that where his services are to be performed;

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and the same principle applies in the case of any other skilled practitioner.

Queen v. *Doutre*, 1884, 9 Ap. Ca. 745, Watson.

§ 219. The operation of a contract of affreightment depends on the law of the flag, that is, on the personal law of the shipowner. If the owner finds it convenient to register his ship in another country, it is still his law, and not that of the material flag, which is intended by the expression: see what was said by lord justice Brett, in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company*, 1882, 10 Q. B. D., at pp. 534—536.

In *Lloyd* v. *Guibert* a French ship was chartered by her master to a British subject, in a Danish port, for a voyage from a Haytian port to England; and the question was as to the owner's liability to indemnify the charterer against a bottomry bond on ship, freight and cargo, made during that voyage in a Portuguese port. It was decided in 1864, 33 L. J., N. S., Q. B. 241, by Blackburn, Cockburn and Mellor—Crompton is added in the report in 6 B. & S. 100—that the master's authority to bind the owner towards the charterer depended on the law of his flag; which was in accordance with the decision of Story, as a United States judge, in *Pope* v. *Nickerson*, 1844, 3 Story 465. On appeal, 1865, L. R., 1 Q. B., 115, and 6 B. & S. 100, it was decided by Willes, Erle, Pollock, Martin, Keating and Pigott, not only that this was so, but also that the owner could equally have defended himself by the law of his flag if he had been present in the foreign port and made the contract of affreightment himself. In the Louisiana cases of *Malpica* v. *McKown*, 1830, 1 Louis. 248, opinion of court delivered by Porter, and *Arayo* v. *Currell*, 1830, 1 Louis. 528, opinion of court delivered by Martin, it had been held that it made indeed no difference whether the contract of affreightment was made by the owner personally or by the master, but that in either case its operation would depend on the *lex loci contractus*.

The master's authority to bind the cargo by a contract of bottomry may also be considered as a result of the contract of affreightment, by virtue of which he receives the cargo on board; and that this authority depends on the law of the flag has been accordingly held in *Droege* v. *Suart*, or *The Karnak*, 1869, L. R., [2] P. C. 505, Erle, and in *The Gaetano and Maria*, 1882, 7 P. D. 137, Brett, Cotton and Coleridge, reversing Phillimore, 1881, 7 P. D. 1.

The master's authority to bind the ship and freight by a contract of bottomry depends on the same principle as the narrower of the two decisions in *Lloyd* v. *Guibert*, for he can have no other authority to bind the owner towards the lender than towards the charterer. It has been seen in § 150 that the acquisition of real rights, as those of pledge or lien, even in movables, is generally to be decided by the *lex situs*. But if a question of agency arises, the *lex situs*, as remarked on p. 182, cannot confer an authority as against a person who is not subject to it.

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Whether the master has duly delivered the cargo depends on the law of the flag: *The Stettin*, 1889, 14 P. D. 142, Brett.

In *re Missouri Steamship Company*, 1888, 42 Ch. D., at p. 327, it is said by Justice Chitty that the law of the flag "ought to be applied not merely to questions of construction and the rights incidental to or arising out of the contract of affreightment, but to questions as to the validity of stipulations in the contract itself."

The law of the flag however is of no authority as against an insurer: *Greer* v. *Poole*, 1880, 5 Q. B. D. 272, Lush and Cockburn.

Laydays run from what by the custom of the port of discharge is considered to be arrival. *Norden Steamship Company* v. *Dempsey*, 1876, 1 C. P. D. 654; Coleridge, Brett, Lindley. This however belongs rather to the interpretation than to the operation of the contract.

See on the subject of this § *The Patria*, 1871, L. R., 3 A. & E. 436, Phillimore, and *The Express*, 1872, L. R., 3 A. & E. 597, Phillimore.

§ 220. General average.

Owners are bound by a general average adjustment made at the port of destination according to the law of that port; and so are insurers, so far as the loss incurred by the insured, or to which the insured is obliged to contribute, arose from a peril insured against or its consequences, or from proper endeavours made in order to avert a peril insured against or its consequences: *Harris* v. *Scaramanga*, 1872, L. R., 7 C. P. 481; Bovill, Keating, Brett. This, so far as concerns the liability of insurers, agrees with *Walpole* v. *Ewer*, 1789, Park on Marine Insurances, 8th edn., p. 898, Kenyon; and with the result in *Newman* v. *Cazalet*, ib., p. 899, Buller, though there it was put on usage and not on law: but it overrules *Power* v. *Whitmore*, 1815, 4 M. & S. 141, Ellenborough, Le Blanc and Bayley; in which no usage was proved, and the law was held to be that an insurer is only bound by a general average stated according to his *lex loci contractus*.

§ 221. Marine insurance.

Whether the insured is accountable to the insurer who has paid him, for money received *aliunde* in respect of the loss, depends on the law governing the contract of insurance: *Burnand* v. *Rodoconachi*, 1880, 5 C. P. D. 424, Coleridge; see end of judgment, where there can be little doubt that the law of the contract was intended to be referred to, though the *lex fori* is mentioned. Also see § 220, and *Greer* v. *Poole*, quoted under § 219.

§ 222. The contract of a carrier to carry passengers or goods from one country to another.

As to illegality of charge on the ground of inequality. Erle, and perhaps also Keating, seem to have considered that this would depend on the *lex loci contractus*, and not on the law of the carrier's country, in *Branley* v. *South*

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Eastern Railway Company, 1862, 12 C. P., N. S., 63: but it was not necessary to decide the point.

As to legality of stipulation limiting liability. *Lex loci contractus*, where the contract is made in the proper country of the company which is the carrier: *Peninsular and Oriental Steam Navigation Company* v. *Shand*, 1865, 3 Moo. P. C., N. S., 272, Turner. See above, p. 255. In *Cohen* v. *South Eastern Railway Company*, 1877, 2 Ex. D. 253, the company made the contract abroad, in a country the law of which was held to be the same on the point as that of the company's country; but had it been necessary to choose between them, Baggallay leant to the *lex loci contractus*, and Mellish to the law of the company's country, taking into account that the other party belonged to the same country, while Brett leant to the latter law without referring to that circumstance.

§ 223. Agency.

The right of an undisclosed principal to sue on a contract made by the agent with a third party, and the consequences of that contract if so sued on, depend on the law which governs that contract, and not on the law which governs the contract between the undisclosed principal and the agent.

Maspons v. *Mildred*, 1882, 9 Q. B. D. 530; Lindley, Jessel and Bowen.

§ 224. Place of contracting in the case of contracts *inter absentes*.

When a contract is made by an interchange of letters or telegrams, it is held to have been made, so far as that may be important, at the place from which the reply concluding the contract is despatched.

Cowan v. *O'Connor*, 1888, 20 Q. B. D. 640, Manisty and Hawkins.

§ 225. Interest will be given by the court according to the law of that country in which the principal ought to have been paid.

Champant v. *Ranelagh*, 1700, Pre. Ch. 128, 1 Eq. Ca. Abr. 289, wrongly reported in 2 Vern. 395, Wright; *Ellis* v. *Loyd*, 1701, 1 Eq. Ca. Abr. 289; *Dungannon* v. *Hackett*, 1702, 1 Eq. Ca. Abr. 288; *Stapleton* v. *Conway*, 1750, 1 Ves. Sen. 427, Hardwicke; (in *Connor* v. *Bellamont*, 1742, 2 Atk. 382, Hardwicke, it probably appeared that the sum secured by the bond was to be paid in Ireland;) *Bodily* v. *Bellamy*, 1760, Burr. 1094, Mansfield, where the distinction is drawn between the interest to be incorporated in the judgment and that which the judgment bears, the latter being governed by the *lex fori*. In the above cases the question was as to the rate of interest, but the rule is the same when the question is whether compound interest is payable: *Fergusson* v. *Fyffe*, 1841, 8 C. & F. 121, Cottenham. It must be observed that the *lex loci solutionis* is not expressly made the ground of decision in all the cases cited in this paragraph, but none of them are inconsistent with its being the ground.

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See also *Cooper* v. *Waldegrave*, under § 229; and above, § 206.

As all usury laws have been repealed in England, it will be sufficient to refer to the cases in which, while they existed, their operation with regard to contracts connected in some way with other countries was considered, without attempting to extract general general rules from them. If the validity of a contract as affected by a foreign usury law had to be considered, much might depend on the precise character of the law. *Dewar* v. *Span*, 1789, 3 T. R. 425; Kenyon, Ashurst, Buller, Grose: *Harvey* v. *Archbold*, 1825, 3 B. & C. 626; Abbott, Bayley, Littleldale: *Anonymous*, 1825, 3 Bing. 193, opinion of judges delivered to house of lords by Best: *Thompson* v. *Powles*, 1828, 2 Sim. 194, Shadwell: *Exp. Guillebert*, 1837, 2 Dea. 509; Erskine, Rose, Cross.

§ 226. A debt payable abroad being recovered in England, the judgment must be for so much money as, if remitted to the country where it ought to have been paid at the rate of exchange current at the time the judgment is recovered, will there produce the amount of the debt.

Scott v. *Bevan*, 1831, 2 B. & Ad. 78, Tenterden, Parke and In *Cash* v. *Kennion*, 1804 and 1805, 11 Ves. 314, lord Eldon dwelt on the duty of a person who is bound to pay a certain sum at a certain place on a certain day, to have it there on that day; and added, "if he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed." From this the conclusion has been drawn that where the time and place of payment are fixed by contract, the rate of exchange ought to be taken as at the time so fixed: *Bertram* v. *Duhamel*, 1838, 2 Mo. P. C. 212, Erskine. But if interest be computed at the rate of the place where payment ought to have been made, and then judgment be given for that sum which will produce the amount at the rate of exchange on the date of its recovery, the creditor will receive "as much as he would have had if the contract had been performed." The question in dispute in *Bertram* v. *Duhamel* was really one of the measure of damages, as dependent on the true appreciation of the transactions.

Bills of Exchange and Promissory Notes.

The subject of bills of exchange and promissory notes furnishes a large and interesting field for the application of the doctrines of this chapter. It must be introduced by the legislation which there has been on it since the previous edition of this book was published.

§ 227. " *Conflict of Laws.*

" 72. Where a bill drawn in one country is negotiated, accepted,

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or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows :—

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance or indorsement or acceptance supra protest, is determined by the law of the place where such contract " (*sic*) " was made.

Provided that—

(*a*) Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue :

(*b*) Where a bill, issued out of the United Kingdom, conforms as regards requisites in form to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of this act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill is determined by the law of the place where such contract is made.

Provided that, where an inland bill is indorsed in a foreign country, the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom.

(3) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4) Where a bill is drawn out of but payable in the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable."

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Bills of Exchange Act 1882; st. 45 & 46 Vict. c. 61, s. 72.

§ 228. No. (1) of s. 72 (above, § 227) determines a question about which the English authorities gave no clear result, namely, do parties to a bill or note, so far as their liability depends on an indorsement made by a third party, contract to pay one who takes by an indorsement valid according to its own law, or one who takes by an indorsement valid according to the law of their contract? The question arises on instruments indorsed in blank in France, where such an indorsement does not transfer the property in a bill or note, though it does so by English law.

In *Trimbey* v. *Vignier*, 1834, 1 Bing. N. C. 151, 4 Mo. & Sc. 695, Tindal and ?, which was an action against the maker of a promissory note payable in France and indorsed there in blank, the judgment was for the defendant, but it does not appear with certainty whether the French law was adopted on the ground of the place of indorsement or on that of the place of payment. In *Lebel* v. *Tucker*, 1867, L. R., 3 Q. B. 77, Mellor and Lush, which was an action against the acceptor of a bill payable in England and indorsed in France in blank, the judgment was for the plaintiff. In *Bradlaugh* v. *De Rin*, 1868, L. R., 3 C. P. 538, which was also an action against the acceptor of a bill payable in England and indorsed in France in blank, Montague Smith delivered an opinion in favour of the plaintiff, but Bovill and Willes decided against him on grounds which pointed to the place of indorsement, although they distinguished the case from *Lebel* v. *Tucker* on the ground of the place of drawing, on which neither Mellor nor Lush had relied.

The enactment now under consideration has decided the special question in favour of the forms required by the *lex actus* of the indorsement, which is in agreement with the usual principles of our subject and with the opinion of Story (Conflict of Laws, § 316 a). Convenience points to the same conclusion, for an indorser cannot be expected to know or to follow the forms required in any place foreign to that in which he acts. But it will be observed that to the general solution an exception is made by the proviso (*b*), which allows a bill to be issued in British form out of the United Kingdom for circulation and payment in the United Kingdom.

What however if such a bill as contemplated in the exception is indorsed before reaching the United Kingdom, in a form valid by British law but not by the *lex loci actus*? This case arose in *re Marseilles Extension Railway and Land Company, Smallpage's and Brandon's cases*, 1885, 30 Ch. D. 598, Pearson. The bills were older than the enactment of 1882, but the learned judge held on

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principle that they were to be regarded as English for all purposes, and therefore sustained the indorsements.

The proviso (*a*) enacts the non-necessity of the stamp of the place of issue, so deciding for this case a question discussed under § 209.

The remaining subdivisions of s. 72 of the Bills of Exchange Act 1882 (above, § 227), may be considered as their matter arises in connection with the propositions which afford the best means of grouping the principles illustrated by the cases.

§ 229. The obligation incurred by accepting a bill of exchange or making a promissory note is measured by the law of the place where it is payable. It is a familiar example that the allowance of days of grace is regulated by the law of the place of payment.

This proposition coincides with the first paragraph of No. 2 of s. 72 (above, p. 266), so far as that paragraph applies to acceptance and acceptance supra protest, and on the supposition that in "interpretation" it was intended to include obligation.

An acceptance having been vacated by a judgment in the place where the bill was accepted and payable, the acceptor cannot be sued in England: *Burrows* v. *Jamineau*, 1726, King; Moseley 1, Sel. Ca. in Ch. 69, 2 Eq. Ca. Abr. 524, Strange 733: the law by reason of which the acceptance was vacated is differently stated in different reports. On default of payment by the acceptor, he is liable to pay interest at the rate fixed by the law of the place where the bill was payable: *Cooper* v. *Waldegrave*, 1840, 2 Beav. 282, Langdale. See above, § 225.

In *Chapman* v. *Cottrell*, 1865, 3 H. & C. 865, a promissory note was made at Florence, but dated in London, and delivered in London to the payee by the maker's agent. For the purpose of jurisdiction, under an enactment now superseded, Martin, Bramwell and Channell held that the contract was made in London by the delivery there.

§ 230. Since the drawer or indorser of a bill of exchange, and the indorser of a promissory note, are sureties for the due performance of the obligation incurred by accepting or making it, the law of the place where the bill or note is payable according to the terms in which it is drawn or made, as regulating such due performance, indirectly affects their obligation by affecting that of the acceptor or maker.

This proposition is probably not set aside by No. 2 of s. 72 (above, p. 266), because, by whatever law the drawing or indorse-

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ment be interpreted, it cannot in accordance with mercantile usage be otherwise interpreted than as constituting the drawer or indorser a surety as above expressed. It has been suggested under § 229 that the act intended to include obligation in "interpretation," but, whether that be so or not, it at least may be presumed that it was not intended to exclude the true sense of "interpretation."

During the war of 1870—1 between France and Germany, and the subsequent troubles in France, French laws enlarged the time for the payment and protest of bills. Everything being rightly done after the expiration of the enlarged time, those who had drawn and indorsed in England bills payable in France remained liable on them. *Rouquette* v. *Overmann*, 1875, L. R., 10 Q. B. 525, Cockburn, Lush and Quain.

In *Allen* v. *Kemble*, 1848, 6 Mo. P. C. 314, Pemberton Leigh, where the acceptor had a right of set off by the law of the country in which the bill was payable, the same right was allowed to the drawer and indorser on the ground of the law of the country in which they had respectively drawn the bill and indorsed it, which so far as concerned their obligation was contrasted in the judgment with the law determining an acceptor's obligation. But set off is not a modification of the defendant's obligation, but a matter incident to the enforcement of it, and therefore belongs to the *lex fori;* so that if the acceptor had been himself the defendant he could only have enjoyed it on the ground of the *lex fori*, not on that of the law of the place where the bill was payable. The decision was however right, because the drawer and indorser were sued where they became parties to the bill, so that the law of that place was in fact the *lex fori*. See *Cockburn* in *Rouquette* v. *Overmann*, u. s., p. 540; and the remarks on *Gibbs* v. *Fremont*, below, p. 273.

In *Allen* v. *Kemble*, u. s., the bill was addressed by the drawer to the acceptor at his residence in one country, and made payable by the acceptor in another country. It is no doubt true, as noticed in the judgment, that such an alteration could not affect the obligation either of the drawer or of any one who had endorsed the bill before it was made.

§ 231. In case of failure by the drawee to accept a bill of exchange, or of failure in payment by the acceptor of a bill of exchange or the maker of a promissory note, the necessity and sufficiency of demand, protest or notice of dishonour, by the last holder, in order to charge any other party to the bill or note, is determined by the law of the place where it was payable.

This is a consequence of the principle of the *lex loci actus*. Under whatever law the drawer or indorser became a party to the bill or note, so far as his liability depended on acts to be performed at the place where it was payable, he was bound to expect that those acts would be performed in accordance with the law of that place

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and not otherwise. A snare would be laid for the last holder of the instrument, if he had to follow the directions of any other law with regard to what he has to do there in order to preserve his recourse against previous parties.

No. 3 of s. 72 (above, p. 266) appears to agree with the §, notwithstanding the strange wording by which parliament is made to say that the necessity of an act is to be determined by the law of the place where it is done, while it is just when an act has not been done that the question of its necessity arises.

The case of § 231 arose, and was decided in accordance with the §, in *Rothschild* v. *Currie*, 1841, 1 Q. B. 43, 4 P. & D. 737; Denman, Littledale, Williams, Coleridge: *Hirschfeld* v. *Smith*, 1866, L. R., 1 C. P. 340; Erle, Byles, Keating, Smith, and *Horne* v. *Rouquette*, 1878, 3 Q. B. D. 514; Brett, Bramwell, Cotton. In *Rouquette* v. *Overmann*, mentioned above under § 230, the discussion did not turn only on the substantial question of the enlargement of time for payment, but also on the formal question of the sufficiency of the demand, protest and notice, as not having been made and given within the original time; and so far as the case turned on that point it is another authority for § 231.

§ 232. But when an indorser has been made duly liable on a bill or note, the notice which he must give to his indorser, or to the drawer if there be no intermediate party, depends on the law governing the contract made by the indorsement to him or by the drawing.

The drawer of the bill, and each indorser of the bill or note, contracts with the next following party to pay him on due notice of the liability being given; and such notice must be measured by the law of the contract, whenever no question arises about the formalities to be observed in a particular place.

No. 3 of s. 72 (above, p. 266) appears to say that the sufficiency of a notice of dishonour by *any* holder is to be determined by the law of the place where the bill is dishonoured, for the words "the place where the act is done," with the supplement "or is not done" which it is necessary to understand, appear to refer only to protests. The doctrine which would thus be arrived at conflicts with that laid down in the §, which nevertheless was distinctly asserted by each of the judges in *Horne* v. *Rouquette*, quoted under § 231, and seems to

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be unassailable in principle. I cannot believe that the enactment will be allowed to displace a doctrine possessing such authority, and probably the easiest way of preventing that result will be to interpret No. 3 as applying only to the last holder, which would not be a greater violence than that to which it is sometimes necessary to subject the language of acts of parliament. To apply the words "where the act is done" to the notice of dishonour, even were it possible, would not be a remedy, because an indorsee who is not the last holder may have to give that notice to his indorser in a country which is not that of the indorsement.

In *Horne* v. *Rouquette* a further question which did not then arise was noticed, and the decision of it reserved. When an indorser has been made duly liable on a bill or note, and the indorsement to him was governed by a different law from that governing a still earlier indorsement, or from that governing the drawing of the bill, and he seeks to charge such earlier indorser or the drawer, passing over his immediate indorser, by what law must the sufficiency of the notice he is to give be measured? This question involves that of the interpretation of the contracts made by drawing a bill and putting it in circulation and by indorsing a bill or note.

§ 233. In § 232 mention has been made of the law governing the drawing and putting in circulation of a bill, or the indorsement of a bill or note. This will in general be the law of the place where the bill or note was signed by the drawer or indorser, but if the instrument after being so signed is sent to the taker in another country, the contract, being only completed by the taking, is one of the latter country.

Horne v. *Rouquette*, 1878, 3 Q. B. D., point as to the indorsement to Monforte; Brett, p. 515; Bramwell, p. 521; Cotton, pp. 523, 4. See also *Chapman* v. *Cottrell*, quoted under § 229.

§ 234. On the dishonour of a bill of exchange either by non-acceptance or by non-payment at maturity after acceptance, the holder is entitled, as damages due in the latter case from the acceptor and in both cases from the other parties to the bill as guarantors, to the amount of the bill, with interest from the time and

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at the rate of the place when and where it was payable or would have been so if accepted, and with his costs. He may have recourse to reexchange: that is, he may draw a new bill at sight, on the drawer or any indorser of the original bill, for such a sum that, if sold at the place where the original bill was payable, it will produce the above amount. The drawee of the new bill, receiving it with the original bill, will become entitled to the latter on paying the former; and will then be able to recover what he has so paid from the acceptor, if any, of the original bill, as damages which he in his turn has incurred by its dishonour. If no new bill be drawn, still the theory of reexchange determines the amount which the holder can recover from the drawer or an indorser, and which the drawer or an indorser can recover over from the acceptor, if any, supposing that he has himself paid it or that it has been demanded of him and he is liable to pay it. If the contract of the drawer, or of the indorser to whom the holder has recourse, is governed by a law—see § 283 as to this—which fixes a certain percentage on the amount of the original bill in lieu of what would be the actual amount of the redraft on the theory of reexchange, or in lieu of any ingredient entering into that amount, then, whether a new bill be drawn or not, such law will determine the liability of the drawer or of such indorser, and that of the acceptor in recovery over.

Francis v. *Rucker*, 1768, Ambler 672, Camden; *Auriol* v. *Thomas*, 1787, 2 T. R. 52, Buller and Grose; *Walker* v. *Hamilton*, 1860, 1 D. F. J. 602, Campbell, Knight-Bruce and Turner; *Suse* v. *Pompe*, 1860, 8 C. B., N. S., 538, Byles, Erle and?; *Re General South American Company*, 1877, 7 Ch. D. 637, Malins. The party who sues the acceptor need not have paid the reexchange, if it has been demanded of him and he is liable for it: *De Tastet* v. *Baring*, 1809, 11 East 265, Ellenborough and?. *Napier* v. *Schneider*, 1810, 12 East 420,?, if that case was not a mere action against the acceptor by a holder to whom recourse had not been had, and *Woolsey* v. *Crawford*, 1810, 2 Camp. 445, Ellenborough, are not law.

Where the bills dishonoured had been drawn by a firm in one country on itself in another country, and remained in the hands of parties to whom they had been given by that firm in the first country in connection with transactions which did not contemplate their payment in the other country, the holders were not entitled to damages in the nature of reexchange from the firm as drawers, but could only treat the bills as promissory notes, or resort to the rights which had been suspended by taking them: *Willans* v. *Ayers*, 1877, 3 Ap. Ca. 133, Colvile.

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In *Gibbs* v. *Fremont*, 1853, 9 Exch. 25, Alderson, Martin and ?, it was held that the drawer of a bill dishonoured by non-acceptance is liable to pay interest to the holder only at the rate of the place of drawing. No attempt was made to distinguish the case of non-acceptance from that of dishonour by non-payment, or to deny that interest at the rate of the place of payment is the true measure of the damages incurred in either. But for the usual doctrine that the drawer guarantees the acceptance and payment, there was substituted the doctrine that he gives an order for payment, and contracts that if such order should not produce the desired effect he will pay the amount of the bill in the place of drawing. Such a doctrine is inconsistent with the whole theory of reexchange, and not merely with that part of it which relates to the rate of interest; and it is inconsistent with the first of the two grounds on which *Rouquette* v. *Overmann* was decided, § 230. The court, in deciding *Gibbs* v. *Fremont*, was influenced by the dicta in *Allen* v. *Kemble*, as to which, see above, under § 230. In *Auriol* v. *Thomas*, u. s., Buller observed that the interest covered by a fixed rate for reexchange would be that allowed where the bill was payable.

The doctrine of § 234 has not been affected by s. 57 of the Bills of Exchange Act, 1882: *Re Gillespie, exp. Robarts*, 1885, 16 Q. B. D. 702, Cave; 1886, 18 Q. B. D. 286, Esher, Lindley and Lopes. See also *Re Commercial Bank of South Australia*, 1887, 36 Ch. D. 522, North.

Obligations quasi ex contractu.

§ 235. An obligation *quasi ex contractu*, like one arising from tort, is occasioned by the act of one party; but it resembles obligations by contract in that the act which occasions it is a lawful one. We have seen on p. 205 that in Roman law the special forum of an obligation *quasi ex contractu* is at the place with which the act that occasions it has the most real connection, and there can be little doubt that the proper law of such an obligation ought generally to be drawn from the same place. For example, any liability under which a husband may lie for the antenuptial debts of his wife is an obligation *quasi ex contractu*. The act which occasions it is the marriage, and this has the most real connection with the matrimonial domicile, as well otherwise as because the law of that place determines the effect of the marriage at least on the wife's movable property, and a liability for her antenuptial debts cannot fairly be imposed on the husband except in return for an interest which the law may give him in her property. But the same way of thinking which upon the obligation of contracts sets up the *lex loci celebrati contractus* against the *lex loci solutionis* here sets up the place of celebrating the marriage, as that where the act occasioning the obli-

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gation *quasi ex contractu* happened to occur, instead of the domicile with which that act has the most real connection.

In *De Greuchy* v. *Wills*, 1879, 4 C. P. D. 362, Grove and Lopes, where a man domiciled in England was also married there after the passing of the Married Women's Property Act 1870, he was held not liable, beyond the assets derived through his wife as mentioned in the act, for antenuptial debts contracted by his wife in Jersey; but Lopes thought that notwithstanding his English domicile he would have been further liable if the marriage had taken place in Jersey, and Grove thought that perhaps he would have been.

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CHAPTER XIII.

TRANSFER AND EXTINCTION OF OBLIGATIONS.

The maxim *unumquodque dissolvitur eodem modo quo colligatur* has always caused a feeling that the questions what law governs the creation of an obligation, and what law governs its extinction, must be in some way related to one another; but various and even confused opinions have been held as to the nature and extent of the relationship. One source of perplexity has been the attempt to distinguish between an obligation and the right of action on it, as if the obligation or *vinculum juris* which arises on the occasion of a contract or a tort was any thing else than the right of action. In the case of a proprietary right a distinction more or less similar may be understood. Wherever physical possession is possible, the law has to deal with an enjoyment which can exist independently of it, and it must choose to whom it will appropriate that enjoyment by maintaining or putting him in possession. Then, the enjoyment of the preferred claimant being protected against disturbance by any one whatever, the right which he is said to have is distinguishable from his power of suing the actual disturber, if any, and that power is a true remedy given for the protection of the right. Often a proprietary right is disconnected from the right of immediate possession, but if the ideas involved in it are thoroughly followed out, possession will always be found to lie at the bottom of them, so long as a corporeal thing, movable or immovable, is concerned. Hence a law which ordains a term of prescription with regard to the property in such a thing is correctly expressed if it purports to bar the right, and when the right is gone there can be no longer a remedy. But in a claim of contract or tort, expectation may exist independently of the law but not enjoyment. The law has not to choose to whom it will

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give the right, but whether it will give the right. And the right when given is good only against the contractor or tortfeasor. The right of action against him is not distinguishable from any larger right existing in the case, nor is it a remedy given for the protection of any larger right, but it is the whole of the right. Hence a law which ordains a term of prescription with regard to claims on contract or tort is usually and correctly expressed as barring the action: when the action is gone there is no obligation left.

A right being once given on the occasion of a contract or tort, such right may partake of the nature of property as forming part of the wealth of the person in whose favour it exists: thus it may if the law permits be transferred, or transmitted on death to successors. But in whatever degree it resembles property in relation to third parties, it remains obligation as between the person clothed with the right on the one hand and the contractor or tortfeasor and his representatives on the other hand. Even in such cases as those of patents and copyrights, where the law creates in one party a property, often of considerable value, by enacting that certain conduct in other parties shall be deemed a tort, the first party's right of action against those others is the subject of the property and not a remedy for the protection of it. Between corporeal and incorporeal things there is this inevitable difference, that while property in the former is the legal regulation of an enjoyment existing independently of the law, property in the case of the latter presupposes the creation by law of the thing of which it is the regulated enjoyment, and that thing is a right but not property.

From the principle that in cases of contract and tort the right of action is itself the *vinculum juris*, the consequence follows that when an obligation is spoken of as governed by the *lex loci contractus* or *solutionis*, or by the *lex loci delicti commissi*, this can only be understood as meaning that its existence at any moment is referred to such respective law. The nature of an obligation would be ignored if we supposed that its original creation could be separately referred to its proper law, so that it might thenceforward have an independent existence on which another law might seize, and transfer it or enforce it. If the *lex fori* professes to allow the transfer of an obligation the

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existence of which it refers, say for example to the *lex loci contractus*, when that law does not permit such transfer, what it really does is to create a new obligation between one of the contractors and the transferee. Or if the *lex fori* professes to enforce an obligation the existence of which it refers to the *lex loci contractus*, after it has ceased to be enforceable by that law, what it really does is to create a new obligation between the plaintiff and the defendant. Whether or not the proceeding is justifiable is a question which may not be concluded by such an analysis, but it is also a question which cannot be intelligently discussed unless the true nature of the proceeding be disclosed by such an analysis. And the true answer appears to be that there is no justification for creating such new obligations, while on the other hand the *lex fori* may have good reasons for declining to enforce an obligation which in the *forum contractus* or *delicti commissi* may be still enforceable. For instance, a statute of limitations may be based on a danger of perjury, which has a better chance of success when the antiquity of the claim renders the preservation of the evidences relating to it less probable; and in such a case the principle which permits the assertion of any stringent policy of the *lex fori* might fairly be applied.

Transfer of obligations.

§ 236. When an obligation is assignable by its proper law, *lex loci contractus* or *solutionis* or *lex loci delicti commissi*, the assignee may sue on it in England.

Innes v. *Dunlop*, 1800, 8 T. R. 595, (?); action of assumpsit, the consideration being the assignment of a Scotch bond: *O'Callaghan* v. *Thomond*, 1810, 3 Taunt. 82, (?); action on an Irish judgment assigned in accordance with Irish law.

An English promissory note payable to bearer is transferable for English purposes by delivery in a foreign country, no matter whether by the law of that country it is transferable or not: *De la Chaumette* v. *Bank of England*, 1831, 2 B. & Ad. 385; Tenterden, Littledale, Park, Patteson.

§ 237. When an obligation is not assignable by its proper law, *lex loci contractus* or *solutionis* or *lex loci delicti commissi*, an assignee cannot sue on it in England, at least except subject to all the defences

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which might have been made to a suit by the original party. To that extent it may be said that there is no real assignment, but merely a question of the name in which the suit is brought.

It has been decided that the English act of parliament, by virtue of which promissory notes made payable to bearer or to order are transferable, applies to foreign notes: *Milne* v. *Graham*, 1823, 1 B. & C. 192, (?); *Bentley* v. *Northouse*, 1827, Mo. & Ma. 66, Tenterden. But it did not appear in these cases that the notes were not transferable by the laws of the countries where they were payable. The § is therefore submitted on the ground of principle unopposed by authority. It has been held in Louisiana that the indorsee of a promissory note, by the proper law of which the maker can use against an indorsee all the defences he could use against the payee, must submit to the same defences though by the law of Louisiana such a note is negotiable: *Ory* v. *Winter*, 1826, 4 Mar. N. S. 277, opinion of court delivered by Porter.

Extinction of Obligations.

§ 238. An obligation cannot be enforced in England after it has been barred by the English statute of limitations, notwithstanding that it has not been barred according to its proper law.

British Linen Company v. *Drummond*, 1830, 10 B. & C. 903, Tenterden: *Pardo* v. *Bingham*, 1868, L. R., 6 Eq. 485, Romilly; and 1869, L. R., 4 Ch. Ap. 735, Hatherley. The same principle was involved in *Ruckmaboye* v. *Mottichund*, 1853, 8 Mo. P. C. 4, 5 Mo. I. A. C. 234; where it was decided that a British court of justice established in India, by applying the English statute of limitations to actions on contracts between Gentoos, did not violate the provisions of a charter requiring that the Gentoo laws of contract should be observed between Gentoos.

A corresponding determination to that of the § was made for Scotland in *Don* v. *Lippmann*, 1837, 5 C. & F. 1, Brougham. In the Scotch case of *Campbell* v. *Stein*, 1818, 6 Dow. 116, Eldon, it had been recognized as law "that where the merchant creditor resides in England and his debtor in Scotland, the latter may plead" the Scotch prescription: p. 134. In *Don* v. *Lippmann*, Brougham, referring to this, said: "why is it that the law of the domicile of the debtor was there allowed to prevent the plaintiff from recovering? It was because the creditor must follow the debtor and must sue him where he resides, and by the necessity of that case was obliged to sue him in Scotland. In that respect therefore there was in that case no difference between the *lex loci solutionis* and the *lex fori*": u. s., p. 19. But somewhat inconsistently lord Brougham is made in the same page to say of *Campbell* v. *Stein*, "that case cannot be reconciled with the principle that the *locus solutionis* is to prescribe the law." If it be true, as it is, that in the case of a general account, with no particular *locus solutionis* other than the debtor's domicile, the *locus solutionis* and that domicile agree, it must surely follow that a decision based on the one is at least reconcilable with the other.

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The last § may very well be justified on the principle stated above, p. 277, that although the *lex fori* cannot properly create a new obligation after the one which arose by the contract or tort has ceased to exist, it may yet regard its statute of limitations as a stringent rule of domestic policy, in obedience to which it may decline to give effect to that obligation even while existing. But the English and Scotch decisions cited in support of the § do not place it on that ground, but on the extremely questionable one that the term of prescription of an obligation always depends on the *lex fori*. Accordingly the following §, which is justifiable on that ground alone, if at all, rests on authority as yet uncontradicted in England.

§ 239. An action can be brought in England on a contract or tort so long as an obligation resulting from such contract or tort would not have been barred by the English statute of limitations, notwithstanding that the obligation which in fact resulted from it has been barred according to its proper law, *lex loci contractus* or *solutionis* or *lex loci delicti commissi*.

Huber v. *Steiner*, 1835, 2 Bing. N. C. 202, 2 Scott 304, Tindal and (?): *Harris* v. *Quine*, 1869, L. R., 4 Q. B. 653; Cockburn, Blackburn, Lush, Hayes. See *Alliance Bank of Simla* v. *Carey*, 1880, 5 C. P. D. 429, Lopes, quoted above under § 210.

A corresponding doctrine to that of the § was laid down for Scotland by Cottenham in *Fergusson* v. *Fyffe*, 1841, 8 C. & F. 121: "the English statute of limitations is irrelevant"; p. 140.

It would not fall within the scope of this work to examine in detail the various opinions entertained in foreign countries on the subject of the last two § §. The old continental authorities were very much divided between the law of the forum and the special law of the obligation, as determining the time of prescription; and some who admitted the authority of the latter law in the matter of prescription, when it resulted from the fact that the parties to a contract had named a place for its performance, did not allow any authority in that matter to the *lex loci contractus* as such. There was afterwards a time when the courts of cassation or appeal in the principal continental countries so generally agreed in referring the prescription of obligations to their special law, in every case, and whether the term

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thence arising was longer or shorter than that of the forum, that that doctrine, which had also the great authority of Savigny in its favour, might be called the usual European one. But the later continental decisions are again discordant. Story pronounces for the *lex fori* with a positiveness which he does not always show where the writers who preceded him are so divided, but he mentions with apparent approval a distinction which must be noticed here, because Tindal quoted it from him, also with approval, in *Huber* v. *Steiner*. "Suppose," says Story, "the statutes of limitation or prescription of a particular country do not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declare it a nullity after the lapse of the prescribed period; and the parties are resident within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case; under such circumstances the question might properly arise whether such statutes of limitation or prescription may not afterwards be set up in any other country to which the parties may remove, by way of extinguishment or transfer of the claim or title." (*Conflict of Laws*, § 582.) It has been shown in the introductory paragraphs of this chapter that the distinction between the title and the right of action belongs to property and not to obligation; and the case before the supreme court of the United States which Story quotes as an authority that "the bar of a statute extinguishment of a debt, *lege loci*, ought equally to be held a peremptory exception in every other country"—*Shelby* v. *Grey*, 11 Wheaton 361—was one concerning the property in a slave.

Coming now to the extinction of obligations by discharges under bankrupt laws, similar arguments to those which have been used on the subject of prescription would seem to show that an obligation which has been discharged under the bankrupt law of its special forum, or in other words under its special law, ought to be regarded everywhere as discharged; and that there may be reasons why an obligation ought no longer to be enforced, after its discharge has been pronounced even by some other law than its special one. For example, a discharge under the bankrupt law of the forum will be analogous to the expiration of the term allowed by the *lex fori* for bringing an action. If the discharge or the limitation be expressly

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extended by the *lex fori* to all debts, the court will in either case be positively bound to apply such law: if it be a matter of inference whether the law was meant to extend to foreign claims, the reasons for presuming such an intention will be about equally strong in the case of bankruptcy as in that of prescription. A system of bankruptcy which draws the debtor's foreign property within its administration so far as it is able, and admits foreign claims to proof, cannot in fairness refuse to the debtor its protection against the further prosecution of foreign claims. But what if the discharge be under the bankrupt law of the debtor's domicile, such being neither the forum in which it is pleaded, nor the special forum of the obligation? If an international system were established by which a bankruptcy in the debtor's domicile drew with it the administration of all his property, wherever situate, and the equal distribution of the mass among all his creditors, and by which a bankruptcy taking place in any other forum was not permitted to have any operation as to property situate out of its territory, it would be reasonable to allow a universal efficacy to the discharge of a debtor under the bankrupt law of his domicile. We have seen in chapter VI how widely the actual state of things differs from this ideal; but just as a rather vague feeling exists in favour of the unity of administration by a bankruptcy in the domicile, so also a rather vague feeling exists in favour of the universality of a discharge by a bankruptcy in the domicile.

The English doctrines are as follows, premising, as in chapter VI, that insolvency, sequestration, or whatever else the local name may be, and compositions with creditors operating under any such laws, are here included under bankruptcy.

§ 240. The discharge of an obligation under a bankruptcy of the debtor in its special forum—*locus contractus* or *solutionis*, or *locus delicti commissi*—will be deemed to discharge him from it in England.

Ballantine v. *Golding*, 1783, 1 Cooke's Bankrupt Laws, 8th edn., p. 487, Mansfield: *Potter* v. *Brown*, 1804, 5 East 124; Ellenborough, Lawrence, Grose, Le Blanc: *Quelin* v. *Moisson*, 1828, 1 Knapp 266, (?): *Gardiner* v. *Houghton*, 1862, 2 B. & S. 743; Cockburn, Wightman, Crompton, Blackburn. Lord Ellenborough, in the second of these cases, reported lord Mansfield as having laid

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down in the first "that what is a discharge of a debt in the country where it was contracted is a discharge of it everywhere." Cooke had reported him as saying that "where there is a discharge by the law of one country it will be a discharge in another," which being cited to the court of king's bench in *Pedder* v. *Macmaster*, 1800, 8 T. R. 609, Le Blanc and (?), they were naturally at a loss to know on what principle Lord Mansfield had really proceeded, and gave a decision inconsistent with the §.

§ 241. But the discharge of an obligation under a bankruptcy of the debtor in a country which was not its special forum will not be deemed to discharge him from it in England, unless the bankruptcy took place either in the debtor's domicile or under the provisions of an act of the parliament of Great Britain and Ireland.

Quin v. *Keefe*, 1795, 2 H. Bl. 553, Eyre and Buller: *Smith* v. *Buchanan*, 1800, 1 East 6; Kenyon, Lawrence, Grose, Le Blanc: *Lewis* v. *Owen*, 1821, 4 B. & Al. 654, (?): *Phillips* v. *Allan*, 1828, 8 B. & C. 477; Bayley, Holroyd, Littledale; all however agreeing that it might have made a difference if the plaintiff had sought to share in the distribution of the defendant's estate under the foreign bankruptcy: *Bartley* v. *Hodges*, 1861, 1 B. & S. 375, Wightman and Blackburn. In all of these cases the bankruptcy appears to have been founded on a real connection of the debtor with the country where it took place, but in none of them did it appear that the debtor was domiciled in that country; and in *Bartley* v. *Hodges* Blackburn said of the colonial law granting the discharge in question, "it does not bind here in a case where neither the plaintiff nor the defendant is domiciled in the colony." I have therefore deemed it necessary, in framing the §, to reserve the case of a debtor discharged by the bankruptcy law of his domicile; but it is impossible to read the judgment of Kenyon in *Smith* v. *Buchanan* without seeing that he regarded the bankrupt's domicile as unimportant.

§ 242. Where a bankruptcy takes place in any part of the British dominions under the provisions of an act of the parliament of the United Kingdom of Great Britain and Ireland, it will be presumed that parliament intended to give to discharges under such bankruptcy an operation coextensive with its authority, and such discharges will therefore operate in every British court, irrespective of the special forum of the obligation discharged.

Cases on the extent of a discharge under the bankrupt law of England. *Odwin* v. *Forbes*, 1817, Buck 57, privy council on appeal from Demerara: *Edwards* v. *Ronald*, 1830, 1 Knapp 259, privy council on appeal from Calcutta, judgment delivered by Lyndhurst: *Ellis* v. *McHenry*, 1871, L. R., 6 C. P. 228; Bovill, Willes, Keating, Brett; where it was held that a composition deed operating under the bankrupt law of England might have been pleaded in

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Canada to an action for a Canadian debt. But a discharge in an English bankruptcy does not take away the jurisdiction already acquired by a colonial court to punish the debtor for offences committed against the insolvent law of the colony: *Gill* v. *Barron*, 1868, L. R., 2 P. C. 157, Kelly.

Cases on the extent of discharges under the bankrupt laws enacted for other British countries by the imperial parliament. *Philpotts* v. *Reed*, 1819, 1 Br. & Bi. 294, Dallas and (?); law enacted for Newfoundland, and expressly discharging from debts contracted in Great Britain or Ireland. In *Sidaway* v. *Hay*, 1824, 3 B. & C. 12, Abbott, Bayley and Holroyd; law enacted for Scotland; and in *Ferguson* v. *Spencer*, 1840, 1 M. & Gr. 987, Tindal, Bosanquet and (?); law enacted for Ireland; the operation for the discharge was arrived at by inference, and the result was in accordance with the §.

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CHAPTER XIV.

DOMICILE.

Connection of domicile with law: Anglo-Indian, Anglo-Turkish and such like domiciles.

We have seen that in the Roman empire every one might be sued in his domicile for all personal matters, and no one could be sued elsewhere for any such matter except in its special forum or in the place to which he belonged by citizenship, the power of suing him in the latter places being further restricted by the condition of his being actually in them, or, in the case of the special forum of an obligation, possessing property there. Thus the notion of domicile did not originate in the *jus civile*, to which men became subject by enjoying Roman citizenship. On the contrary it was a notion strongly contrasted with that of citizenship, and as its legal importance was derived from the natural equity of not drawing defendants away from their homes to answer suits, it was referred to the *jus gentium*. Hence as much as possible of fact and as little as possible of technicality was allowed to enter into the determination of domicile, a mode of viewing the subject which was strongly reinforced by its connection with the liability to municipal burdens; *domicilium re et facto transfertur, non nuda contestatione, sicut in his exigitur qui negant se posse ad munera ut incolas vocari:* Dig. 50, 1, 20. Hence also it was admitted that a man might have more than one domicile: Dig. 50, 1; l. 5, l. 6, § 2, and l. 27, § 2. And we should perhaps best mark the difference between the ancient Roman and modern English notions if in the Corpus Juris we translated *domicilium* by residence, rather than by a word which in English is exclusively technical.

We have seen too that, down to the commencement of the modern

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movement for attaching importance in private matters to political nationality, domicile did not cease on the continent of Europe to be the chief criterion of the territorial jurisdiction to which a man was personally subject, and therefore also, since the continent has been parcelled out among different territorial laws, the chief criterion of the territorial law to which he was personally subject. But the last circumstance reacted on the legal notion of domicile. The certainty of a man's capacities, rights and duties is not necessarily impaired by his being liable to suit, or to bear municipal burdens, in each of several jurisdictions, but it would be destroyed if the law of more than one jurisdiction could be applied to determine his capacities, rights and duties. Hence the diversity of territorial laws which arose in the middle ages engendered the personal statute, and this tended to establish a more technical and exclusive notion of domicile than had previously been entertained.

Lastly we have seen that domicile was unknown in old English law as the foundation of jurisdiction, and has not even now been made the regular foundation of English jurisdiction on obligations; that its notion was imported into this country from the continent after it had there become a determining element in questions of law, and was so imported because some intercommunion with the continent in questions of law had become a necessity. Hence in England we have chiefly to do with the most technical and exclusive aspect of domicile. As a matter of historical fact, we only know domicile because, when and so far as we borrowed the personal statute, we found that something called domicile was established as its criterion; and to this day we know it little further or otherwise, as will appear from the following sketch of the extent to which rules chosen with reference to the persons, and not to the other circumstances involved in a case, have been established in England.

It is now the better opinion that the personal statute must be applied to capacity as depending on age or on coverture by marriage: above, §§ 2, 3. Guardians, curators and committees, deriving their authority from the personal statute or jurisdiction of a minor or lunatic, are certainly recognized in England to some extent, perhaps more freely as concerns the estate than as concerns the person:

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§§ 6—12. The personal statute must be satisfied as to the capacity of persons who marry in England, except as regards certain causes of incapacity which are not deemed by us to fall within the intercommunion of private international law: §§ 21—25. The law of the matrimonial domicile is allowed to operate on the movable property of a married couple, very much as on the continent: §§ 36—41. In suits for divorce and other matrimonial causes it is not established to be an object that the status of the parties should be regulated by a personal statute, or consequently by any rule which will ensure their having the same status everywhere. It is doubtful whether residence, untechnical and unexclusive, is not as good a foundation as a technical and exclusive domicile, both for the entertainment of such suits in England and for allowing validity in England to foreign sentences in such suits: §§ 44—51. The personal law of a father is allowed to decide as to the legitimation of his children by his marriage after their birth, though with some peculiarity about the date at which that personal law is to be taken: §§ 54—56. The personal statute or jurisdiction of a deceased person, whether testator or intestate, has no direct influence on the title to the movable property left by him in England: §§ 63, 64. But it is allowed a great deal of indirect influence on such title: §§ 65—76, 83. On the other hand the personal statute or jurisdiction of a deceased person is allowed as full and direct authority as on the continent with regard to the validity of his will of movables, and, whether he died testate or intestate, with regard to the beneficial interest in the surplus of his movable property after payment of his debts, and to taxation levied on such beneficial interest: §§ 59—62, 80—91, 105, 106, 114, 120—125. Foreign curators, under a bankruptcy in the personal jurisdiction, are entitled to the bankrupt's movables in England: §§ 134, 135. With regard to an English bankruptcy, the domicile of the debtor has something to do with his liability to adjudication; § 127; and the personal law of a creditor has something to do with his power of holding in England a payment which he has obtained out of the bankrupt's movable property abroad; §§ 142, 143. Questions as to the transfer or acquisition of the property in ships at sea are generally to be decided by the personal law of the party from or against whom the

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transfer or acquisition is alleged to have taken place: § 150. There is a vague impression that the personal law of a bankrupt, with domicile for its criterion, may have something to do with the international effect of a discharge given him in his bankruptcy from obligations of which the special forum was elsewhere: § 241.

Summing up, the personal statute or law, with domicile as its criterion, is applied in England to some extent or other with regard to guardianships, the capacity to marry and to enter into other contracts, the effect of marriage on property, the legitimation of children by the subsequent marriage of their parents, the succession to movable property on death, and the transfer of property not at the time within any territorial jurisdiction; and with regard to the beneficial succession on death to movable property, after payment of debts, it is allowed without dispute to cover the whole ground. But concerning jurisdiction as founded on domicile we can only say that while with regard to guardianships and curatorships, divorce, succession on death and bankruptcy, authority greater or less is allowed in England to the acts of a foreign jurisdiction so founded—and with regard to matrimonial causes, and under the Rules of the Supreme Court 1883 with regard to others, such a foundation for the exercize of jurisdiction in England is acknowledged—yet in most of these cases ordinary residence is treated as being an equally good ground with domicile, or at least it is not clear that it is not so. The great preponderance of law over jurisdiction in the purposes for which an English lawyer has to do with domicile needs no further illustration.

"Residence and domicile are two perfectly distinct things. It is necessary "in the administration of the law that the idea of domicile should exist, and "that the fact of domicile should be ascertained, in order to determine which "of two municipal laws may be invoked for the purpose of regulating the "rights of parties. We know very well that succession and distribution depend "upon the law of the domicile. Domicile therefore is an idea of law. It is "the relation which the law creates between an individual and a particular "locality or country. To every adult person the law ascribes a domicile, and "that domicile remains his fixed attribute until a new and different attribute "usurps its place." Lord Westbury, in *Bell* v. *Kennedy*, 1868, L. R., 1 S. & D. A. 320.

In eo loco singulos habere domicilium non ambigitur, ubi quis larem ac fortunarum suarum summam constituit, unde rursus non sit discessurus si nihil

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avocet, unde cum profectus est peregrinari videtur, quo si rediit peregrinari jam destitit. Code 10, 39, 7. This is a time-honoured quotation, but it can hardly be called a definition, however beautifully it may express the common notion of home or residence.

This being so, the notion which an English lawyer must form of domicile is very much as follows. Certain questions are decided according to laws chosen with reference to the persons, and not to the other circumstances, involved in them. This method of proceeding has come to us in the course of events, and is recommended by various solid motives, such as the welfare of the civil society with which a person is most intimately connected, the wishes or intentions which from his connection with a certain civil society he may be presumed to entertain, and the necessity of choosing some general rule for numerous particulars which are closely concerned with each other. Every person is therefore treated as a member of some one civil society, governed by one body of civil law, which is adopted when a law having reference to his person is sought. These civil societies are not necessarily territorial. They were not such when, after the fall of the Roman empire, Romans, Franks, Burgundians and so forth were governed by their respective laws within the same territory; and they are not now such in the East, where, whether the soil be subject to Turkish, British, Chinese or any other rule, we generally find persons of different races, political nationalities and religions living together under different laws, protected by consular capitulations or by a tolerant sovereignty. But in Christendom each civil society is now a territorial one, whether its territory be coincident with that of a political society, as in the case of France, or be included with others in that of a political society, as England and Scotland are included in the British empire. And the tie by which a person is attached to a civil society is or includes domicile. Within Christendom, every person is a member of that civil society in the territory of which he is domiciled; in the East, every person is a member of that civil society, existing in the territory in which he is domiciled, which his race, political nationality or religion determines. The former case is exemplified in an English, Scotch, or French domicile; the latter in an Anglo-Indian or Anglo-Turkish domicile.

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In *Abd-ul-Messih* v. *Farra*, 1888, 13 App. Ca. 431—judgment of lords Watson and Hobhouse, Sir Barnes Peacock and Sir James Hannen delivered by the first named—the last paragraph was quoted by the judicial committee (p. 440) as "perhaps" giving support to the contention that the succession to the movable property of a Chaldean Catholic, an Ottoman subject and settled during all his life in the Ottoman Empire, ought to be regulated by English law because he had enjoyed British protection. Of course the committee held that it was to be regulated by the laws which govern the successions of Chaldean Catholics in Turkey, and so I had advised, nor do I now see how the last paragraph could lead to any other conclusion. The *de cujus* was a member of the civil society of Chaldean Catholics existing in the Ottoman territory in which he was domiciled. The judgment then proceeds to speak of Anglo-Indian domicile in a passage which the Indian experience of lord Hobhouse and Sir Barnes Peacock will probably render classical. "The latter"—that is an Anglo-Indian domicile, which their lordships had just mentioned *eo nomine*—they say "is altogether independent of political status; it arises from residence in India, and has always been held to carry with it the territorial law of that country, whether under the empire of the queen or under the previous rule of the East India Company, which the courts of England treated in questions of domicile as an independent government. By the law established in India the members of certain castes and creeds are in many important respects governed by their own peculiar rules and customs, so that an Indian domicile of succession may involve the application of Hindu or Mahomedan law; but these rules and customs are an integral part of the municipal law administered by the territorial tribunals." The picture here drawn of British India is no doubt correct for the present time. That region is governed by a general law to which exceptions are made in certain respects in favour of certain castes and creeds, but both the general law and the exceptions are territorial in the sense that they exist by the will of the territorial sovereign, not in the sense of being universally applied within the territory, which *ex hypothesi* they are not. As matter of history I should doubt whether any

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thing that could properly be called a general law for British India existed before the commencement of that great series of British Indian legislation which was inaugurated by Macaulay. Previous to that time I can only discover the laws of the castes and creeds, and, alongside of them and standing on the same footing with them, for the community or society formed by the Europeans, English law, more or less modified by special enactments. But even if I am right in this, the English law and the laws of the castes and creeds were then territorial in the same sense in which the general law and the exceptions now are so, and the remark leads to no difference with regard to the subject in hand. The position described by their lordships and undoubtedly now existing, that of a European, domiciled in British India and subject to the general law, for him not modified, alongside of a native also domiciled in British India and subject to the general law modified for his caste or creed, is exactly the same as that which I conceive to have once existed for a European, domiciled in British India and subject to English law, possibly modified by special enactments, alongside of a native also domiciled in British India and subject to the law of his caste or creed. That position has usually been known by the name of an Anglo-Indian domicile, and I do not gather from the passage which I have quoted that the learned members of the judicial committee objected to that name. An Indian domicile of succession involving the application of Hindu or Mahomedan law, of which they speak, might have been called by some analogous name, compounded of a part expressing the territory in which the domicile exists, and a part expressing the law or modification of law to which the particular class of persons domiciled in that territory is subject. Perhaps it is as well that this has not been done, the multiplication of technical terms being an evil only to be justified by necessity, but it does not therefore follow that we ought to quarrel with the established name Anglo-Indian, in which "Indian" expresses the territory and "Anglo" the law, once English as such, and still English in respect of the base which the dominant country has supplied to the territorial legislation so far as not modified out of deference to caste or creed.

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The question of Anglo-Turkish domicile will be better understood after the foregoing examination of an Anglo-Indian one. The question is really under what law British subjects settled in Turkey are living. Is it English law in every case, or is it the law of that part of the British dominions, be it England, Scotland, or any colony or dependency, in which they or their ancestors were last previously domiciled? The reference to their ancestors is far from being idle, because there are numerous British families in the Levant who have been settled there for generations. In other words, do the British subjects living at Constantinople, Smyrna, or Alexandria, form a society or community whose personal law is English, or are they a number of isolated units, one deriving his British character from England, his neighbour on one side from Scotland, and his neighbour on the other side from (say) Australia, so that they differ in their capacity to marry their deceased wives' sisters, in the distribution which will be made of their movable property in the case of their intestacy, and in various other particulars? The assertion that there is such a thing as an Anglo-Turkish domicile is an implied adoption of the first of the two answers here contrasted: in strict analogy to the term Anglo-Indian, it is the assertion of domicile in Turkey, combined with membership of a community whose personal law, though in Turkey, is English. Correspondingly, the second of the contrasted answers implies the assertion that domicile, apart from any improbability of the necessary *animus*, is not in law transferred to Turkey—or to any other Eastern and non-British country, for the principle is the same throughout—by establishing a residence in such country with an *animus manendi*. This doctrine was first laid down from the bench in the case of *Tootal's trusts*, 1883, 23 Ch. D. 532, Chitty, the head note of which, correctly stating the decision, says that "a British subject cannot acquire by residence in China a new domicile so as to exempt his personal estate on death from the operation of the legacy duty acts. British subjects resident in Chinese territory cannot acquire in China a domicile similar to that existing in India and commonly known as Anglo-Indian." It will be understood that the legacy duty of the United Kingdom does not attach if the theory

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of an Anglo-Turkish or Anglo-Chinese domicile is adopted, because that theory involves the domicile being in Turkey or China, while the duty in question only attaches when the domicile is in some part of the United Kingdom; but on the theory adopted in *Tootal's trusts* it attaches when the *de cujus*, or the ancestor from whom he derives the domicile attributed to him, was (say) English or Scotch, and not when he was (say) Australian.

The first English authority on the subject is *Maltass* v. *Maltass*, 1844, 1 Rob. Eccl. 67, Lushington, in which a will was propounded for probate that had been made by Mr. Maltass, a British subject born and settled all his life at Smyrna, but whose father had at a remote period been domiciled in England. There was no objection to the will by English law, but it was objected that the deceased was domiciled in Turkey and that by Turkish law there is no power in any one to make a will. That argument was easily disposed of by a reference to the treaties, and especially that of the Dardanelles in 1809, by which the Sultan agreed (Art. 26) "that in case any Englishman, or other person subject to that nation or navigating under its flag, shall happen to die in our sacred dominions, our fiscal and other officers shall not, upon pretence of its not being known to whom the property belongs, interpose any opposition or violence by taking or seizing the effects that may be found at his death, but they shall be delivered up to such Englishman, whoever he may be, to whom the deceased may have left them by will; and if he shall have died intestate the property shall be delivered up to the English consul, or, if there be no consul, in that case the property shall be sent over to England in the next ship." Dr. Lushington quoted this, and Art. 46, which he said "contemplates the case of an Englishman permanently resident in Smyrna," also Art. 61, from which it results that "if any Englishman shall turn Turk" his property is to lose the protection of Art. 26. Thus there was a clear agreement that Turkish law should not apply to the successions of Christian British subjects even though domiciled in Turkey, and Dr. Lushington added his full conviction that the law which must take its place was that of England. On the word "will" in Art. 26 he remarked, "this, in my opinion, it is perfectly clear must refer to a will made

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according to the law of England;" and on the word "intestate" in the same article he remarked, "this means intestate by the law of England." The doctrine so laid down is the foundation of that of Anglo-Turkish domicile. No advocate of the latter doctrine has imagined that the application of English law to persons domiciled in Turkey could exist without the consent, express or tacit, of the territorial sovereign, any more than a particular law can be applied in India without such sanction. But the sanction of the Sultan to the exclusion of Turkish law was given by the treaties, and the sanction of the British government to the law which was to take its place was given by the same treaties, which Dr. Lushington judicially interpreted as referring to the law of England, though he had quoted the words "any Englishman or other person subject to that nation." It is true that the judicial committee said in *Abd-ul-Messih* v. *Farra*, "if by Anglo-Turkish the same kind of domicile is meant as that which the appellant seeks to establish, it has no analogy whatever to an Anglo-Indian domicile" (13 Ap. Ca. 440). But no one, except perhaps the appellant's counsel in that case who were in the position of having to catch at straws, ever contended that the domicile in Turkey of a Chaldean Catholic Ottoman subject had any analogy either to an Anglo-Turkish or to an Anglo-Indian domicile, by reason of his having British protection.

But though Dr. Lushington laid down in *Maltass* v. *Maltass* the doctrine which is the foundation of that of Anglo-Turkish domicile, it has not always been sufficiently noticed that he did not lay down the latter doctrine. He contemplates the possibility that Mr. Maltass's domicile was not in Turkey but in England. The supposition that a domicile in England had been retained by absentees and handed down from father to son during a period of eighty years (see 3 Curteis 233, 234), and this in spite of the great appearance that the son was out of business while he continued to reside at Smyrna (see 1 Rob. Eccl. 71), would imply that when domicile is said to be changed *animo et facto*, the *animus* meant is something more than an intention of residing in the territory to which the change is made, and involves some kind or degree of identification with the inhabitants of that territory or with some particular class

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of them. More will have to be said about that doctrine in connection with the case of *Moorhouse* v. *Lord:* for the present it is enough to mention that Dr. Lushington approved it. "I give no opinion," he said, "whether a British subject can or cannot acquire a Turkish domicile, but this I must say, I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte." Therefore the learned judge's decision in favour of admitting Mr. Maltass's will to probate was founded on an alternative; if he was domiciled in Turkey his will was good by the doctrine which has come to be called that of Anglo-Turkish domicile, while if he was domiciled in England it was good by English law *proprio vigore*. The alternative would not have been open if Mr. Maltass's father had emigrated from Scotland or from a British colony instead of from England, because the view that the domicile in the British territory had been retained would then have led to the conclusion that the case was governed by a different law from that of England, which applied on the view that a domicile had been acquired in Turkey, and a choice between those views would have been necessary. To this Dr. Lushington appears to allude in language which is thus reported: "I consider the deceased was domiciled in England, and not in Scotland or in a colony, for great difficulty would have arisen had the deceased been domiciled in Scotland, and a new question if he had been domiciled in British Guiana. I take the deceased to be domiciled in England." That these expressions, doubtless distorted in the report, should be cited as a decision by the learned doctor that Mr. Maltass was domiciled in England and not in Turkey, is in contradiction to his express statement that he did not mean to decide that point. "I wish to observe," he says on p. 80, "that I am desirous not to be supposed to have given an opinion upon any question not necessary to be decided in this case. My judgment therefore does not affect the question of domicile. If the deceased was in the legal sense domiciled in Turkey, and if the law of domicile does prevail, the law of Turkey in conformity with the treaty says that in such case the succession to personal estate shall be governed by the British Law; if he was not domiciled in Turkey but in England,

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then the law of England prevails *proprio vigore*." The wretched punctuation of the report is here corrected.

In *Tootal's trusts*, which has been summarily stated on p. 291, the deceased was a British subject and had his domicile of origin in England, but had emigrated to Shanghai in China, where the learned judge frankly acknowledged that his *animus manendi* was proved. The treaties between the United Kingdom and China afforded a parallel to those between the United Kingdom and Turkey, so far as concerns the sanction of the territorial sovereign to the exercize of British authority in the matter of persons so circumstanced, and the order in council by which, on the base of those treaties, the consular jurisdiction in China was established, and which named the law of England as that to be applied by such jurisdiction, afforded a parallel to Dr. Lushington's interpretation of the treaty of the Dardanelles as importing the law of England. The decision that an Anglo-Chinese domicile was impossible was partly grounded on the statement that Dr. Lushington held Mr. Maltass to be domiciled in England, a statement which I hope has been sufficiently shown to be erroneous, and partly on reasoning which to me is unintelligible. The learned judge recognized that a person becoming domiciled in a territory, in which there are different communities marked by differences of law, must become so domiciled as a member of one or other of those communities. For he said: "It may well be that a Hindoo or Mussulman settling in British India, and attaching himself to his own religious sect there, would acquire an Anglo-Indian domicile, and by virtue of such domicile would enjoy the civil status as to marriage, inheritance and the like accorded by the laws of British India to Hindoos or Mussulmans, and such civil status would differ materially from that of a European settling there and attaching himself to the British community." Passing over the strange use of the term Anglo-Indian as describing the domicile, not of an Englishman, but of a Hindoo or Mussulman in India, the passage appears to be directly in conflict with this other one: "there is no authority that I am aware of in English law that an individual can become domiciled as a member of a community which is not the community possessing the supreme

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or sovereign territorial power." The Hindoos or Mussulmans are as little the supreme or sovereign territorial power in India as the English are such in China. A British subject acquiring a domicile in China, to enjoy there a special law permitted to his community by the territorial government, would be precisely in the position of a Hindoo or Mussulman acquiring a domicile in British India, to enjoy there a special law permitted to his community by the territorial British government. The passage first quoted allows such an acquisition of domicile in the latter case: the passage secondly quoted lays down a general proposition which would forbid it in both cases, and on the strength of that proposition the decision forbids it in the former case. But if Mr. Tootal could not acquire a domicile in China, to enjoy there a special law permitted to his community by the territorial sovereign, did it not follow, his *animus manendi* in China being established, that he acquired a domicile there without the benefit of that special law? This conclusion was rejected by the learned judge on the ground of the improbability of the intention, and Mr. Justice Chitty must therefore be reckoned to have followed Dr. Lushington in considering that the intention required for a change of domicile is something more than a mere *animus manendi* in the territory to which the domicile is alleged to have been transferred.

Tootal's trusts became the subject of comment in *Abd-ul-Messih* v. *Farra*, the decision in which, as we have seen (above, p. 289), was that British protection in the Ottoman empire does not carry with it English law as a personal law, in the teeth of national character, domicile, religion and race, all combined. The argument that it did so, however eminent the counsel employed, could only be marked by more ingenuity than clearness; and it is possible that the arguments by which their lordships rebutted it may have partaken of the obscurity caused by the shadow with which they were fighting. They will command universal assent when they say that "they are satisfied that there is neither principle nor authority for holding that there is such a thing as domicile arising from society and not from connection with a locality." But when they go on to say "*In re Tootal's trusts* is an authority directly in point, and their

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lordships entirely concur in the reasoning by which Mr. Justice Chitty supported his decision in that case"—the observation must be made that a domicile which was not a domicile in a locality, or which did not derive all the essential features of domicile from that connection, was not suggested in *Tootal's trusts*, nor has been suggested anywhere, to my knowledge, except in *Abd-ul-Messih* v. *Farra*. Their lordships further notice the obvious fact that "if a Scotchman went to reside in Egypt for the purposes of his business, leaving his family at home, and happened to die there," he would retain his Scotch domicile. And they lay down the proposition that "residence in a foreign state, as a privileged member of an exterritorial community, although it may be effectual to destroy a residential domicile acquired elsewhere, is ineffectual to create a new domicile of choice." If by an exterritorial community be meant one which enjoys, though under the sanction of the territorial sovereign, a different law from the general territorial one, this proposition conflicts with Mr. Justice Chitty's admission that a Hindoo or Mussulman settling in British India would acquire a domicile there, with the civil status accorded by the laws of British India to Hindoos or Mussulmans. And the only other thing I know of which could be described as an exterritorial community is that composed by the family and suite of an ambassador, who have not, so far as I know, been thought to lose a residential domicile acquired elsewhere. It must also be noticed that with regard to the intention necessary for the acquisition of a new domicile, their lordships quote with approval lord Westbury's requiring, in *Udny* v. *Udny*, only "an intention of continuing to reside there for an unlimited time;" a doctrine which would inevitably lead to the conclusion that Mr. Maltass and Mr. Tootal had acquired domiciles in Turkey and China respectively. These are important *obiter dicta*, but the whole subject of Anglo-Turkish and such like domiciles seems to call for further examination by the house of lords or the privy council.*

* With regard to the reference to Féraud-Giraud, 13 Ap. Ca. 440, it must be observed that the determination of civil rights by political nationality and not by domicile, has not been adopted in England.

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If it should be thought that the balance of convenience lies on the side of rejecting Anglo-Turkish and such like domiciles, notwithstanding the sometimes uncertain researches into the particular British origin of an ancestor which would thereby be occasioned, the best way of doing so would be simply to declare that domicile is one of those branches of law as to which juridical intercommunion with countries not under the government of Christians is not permitted: see above, p. 40. The British subjects settled in Turkey or China would then necessarily retain the last British domiciles of their ancestors or of themselves. Dr. Lushington's opinion that the treaty of the Dardanelles specified the law of England, as governing the movable possessions of the British subjects mentioned in it, would have to be overruled, which might be done by the same reasoning which the privy council applied in *Abd-ul-Messih* v. *Farra* to the order concerning consular jurisdiction in China, namely that the law meant was not that of England specifically, but included any other law, in force in a territory governed by Christians, to which an English court would pay regard by reason of a domicile in its territory. No inconsistencies would be introduced into the general law of domicile, and the application of that general law to British India, as a country under the government of Christians, would be saved, as the privy council appear to have intended to save it in the passage quoted above, p. 289. In the meantime, the subject which it has been necessary to discuss at such length may be summed up by the following §, the meaning of which will, I trust, be beyond mistake.

§ 243. Domicile, being necessarily connected either with law or with jurisdiction or with both, must always be in a territory, though it need not be at any particular spot in the territory. It may be in England, but need not be at York or the like: it may be in India, but need not be at Calcutta or the like. If it be in India, where there are different communities or societies living under different laws, the domicile is not completely stated unless the statement of it include that of the community or society to which the person belongs. Thus it may be described as an Anglo-Indian domicile, or the Indian domicile of a Hindoo or Mussulman. If the

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decisions in *Tootal's trusts* and *Abd-ul-Messih* v. *Farra* have left it still possible that a British subject should be domiciled in an Eastern non-British country, then the description of such a domicile will have to be completed by calling it Anglo-Turkish, Anglo-Chinese, or as the case may be.

Domicile of Origin and of persons not sui juris.

I have contrasted domicile as the foundation of jurisdiction, for which purpose a sufficient practical result is obtainable if it be treated as equivalent to residence and it be consequently admitted that a person may have more than one domicile, and domicile as the criterion of personal law, for which purpose it must be single and therefore something more than residence. The English conception of domicile is of the latter kind, but the singleness which results from it is not therefore limited by us to the occasions when law is in question. When in England we use the term with reference to jurisdiction, if we wish to express that a domicile strictly understood is not necessary, we say that the jurisdiction may be founded either on domicile or on residence, not that there may be more than one domicile. At least I think that this is now acknowledged to be the accurate mode of speaking, though it may not be always observed. In order to the ascertainment for each person of so highly technical an attribute, it is necessary that it should be made to start from an origin imposed by law, such as the domicile of the person's father, after which his own movements may be investigated, but the assumption of which will prevent his ever being without a domicile, even though he should be without any really fixed residence. Therefore the subject branches from the beginning into domicile of origin and domicile of choice. The rules concerning the former are as follows.

§ 244. To every person the law of England attributes at his birth a domicile which is called that of origin, or the original or native domicile.

§ 245. The original domicile of a child born in wedlock to a living father is the domicile of its father at the time of its birth.

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§ 246. The original domicile of a child born out of wedlock is the domicile of its mother at the time of its birth.

Westbury, in *Udny* v. *Udny*, 1869, L. R., 1 S. & D. A. 457: *Urquhart* v. *Butterfield*, 1887, 37 Ch. D. 357, 377; Cotton, Lindley, Lopes.

§ 247. If and as soon as a child born out of wedlock is legitimated, being a minor, the domicile of its father at the time of such legitimation becomes its domicile.

§ 248. The original domicile of a child both whose parents are unknown is the place of its birth, or, if that too be unknown, the place where it is found.

The place thus indicated is that on which the duty of maintaining and educating the child is incumbent, and since his personal ties must be formed by such maintenance and education his personal law will naturally follow. Moreover there is no place to compete.

Intermediate to the foregoing rules and those concerning domicile of choice are certain rules concerning the changes of domicile of persons not *sui juris*, as determined by the action of the persons on whom they depend. So far as a domicile is so determined for a person under age there would be no great impropriety in calling it one of origin, since, like that imposed at birth, it becomes, if retained to majority, the origin from which his domicile is to be traced through the phases of his subsequent choice. And it is sometimes included under that name, though that of native domicile would be inappropriate to it. But the case of an infant is not the only one comprised in the class. For the rest, with regard to the name, it must be borne in mind that domicile of origin, however extended or limited, has nothing to do with the *origo* of Roman law, which was citizenship: see above, pp. 25, 29.

§ 249. The domicile of a legitimate or legitimated unmarried minor follows that of his or her father, and the domicile of an unmarried minor born out of wedlock and not legitimated follows that of his or her mother, through all the changes of such respective domicile.

§ 250. The law or jurisdiction of the father's last domicile provides for the guardianship, after his death, of his legitimate or legiti-

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mated unmarried minor children. A guardian, whether appointed by the father under that law or by that law or jurisdiction itself, cannot change his ward's domicile except so far as he may be permitted to do so by the terms of his appointment, or by the law or the public authority under which he holds his office. Only if the mother is the guardian, and the appointment or law under which she holds expresses nothing contrary, the unmarried minor's domicile will follow the changes of hers, so long as she does not change her domicile with a fraudulent view to the minor's succession. Such fraud however will be presumed, if no reasonable motive can be assigned for the change of her domicile. And where the mother's nominal guardianship is controlled by a court which regards itself as being the real guardian, like the English High Court in the chancery division, she will not have even this limited power of changing her children's domicile. These principles regulate the domicile of a posthumous child, as well as that of a child whose father died after its birth or legitimation.

It is believed that the § is in accordance, so far as those authorities go, with *Potinger* v. *Wightman*, 1817, 3 Mer. 67, Grant, in which case there is a valuable argument by Sir S. Romilly and Swanston, with many references; Lyndhurst in *Johnstone* v. *Beattie*, 1843, 10 C. & F. 66; Campbell in the same case, ib., pp. 138—140; and Wilde in *Sharpe* v. *Crispin*, 1869, L. R., 1 P. & M. 617. But I have stepped beyond those authorities in treating the case of the mother as a special one of guardianship, in taking the law of the father's last domicile as the governing principle for the whole, and in connecting posthumous children with the rest of the §.

§ 251. The domicile of a lunatic who has become such after attaining his majority is not changed by a change in that of the person who has his legal custody. It remains that which it was at the commencement of his lunacy.

In *Bempde* v. *Johnstone*, 1796, 3 Ves. 198, Loughborough doubted whether residence in a country as a lunatic might not be added to previous residence in the same country for the purpose of fixing the domicile there. In *Sharpe* v. *Crispin*, 1869, Wilde appeared to be distinctly inclined towards the doctrine of the §; L. R., 1 P. & M. 618. In *Hepburn* v. *Skirving*, 1861, 9 W. R. 764, Stuart, the point scarcely arose. Dicey maintains the doctrine of the §, but quotes some American cases to the contrary: Law of Domicile, p. 132.

§ 252. But the domicile of a son who has never been of sound

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mind since attaining his majority continues to follow the changes of his father's domicile. The incapacity of lunacy is in this case a mere prolongation of the incapacity of minority.

Sharpe v. *Crispin*, 1869, L. R., 1 P. & M. 611, Wilde.

§ 253. The domicile of a wife, not judicially separated *a mensa et toro*, is that of her husband.

The only serious doubt as to this is whether even a judicial separation *a mensa et toro* enables her to establish a separate domicile. The point, which is involved in the case of the Princess Bibesco, on which a whole literature has arisen on the continent, did not occur in *Dolphin* v. *Robins*, but Cranworth appeared to think that the wife is so enabled, and Kingsdown distinctly thought the contrary: 1859, 7 H. of L. 416, 420. Cranworth even suggested that the wife might be entitled to establish a separate domicile "where the husband has abjured the realm, has deserted the wife and established himself permanently in a foreign country, or has committed felony and been transported:" ib., p. 419. Phillimore inclined towards the separate domicile of a wife either judicially separated or entitled to a judicial separation or divorce, but on grounds which appear to confound domicile with residence: in *Le Sueur* v. *Le Sueur*, 1876, 1 P. D. 141; as to which case see above, p. 80.

From *Williams* v. *Dormer*, 1851, Fust, and 1852, Dodson, 2 Robertson 505, it appears that a wife judicially separated *a mensa et toro* will not be deemed to be legally resident in the same place as her husband, for the purpose of founding jurisdiction against her in a suit of nullity of marriage afterwards brought by him. Domicile is mentioned in Dodson's judgment, but it must not be concluded that this is an authority in favour of the power of a wife judicially separated to change her domicile, because the jurisdiction in suits of nullity of marriage is not held in England to turn on domicile. See above, § 49.

Domicile of Choice: Doctrine of Moorhouse *v.* Lord.

We now come to that action by a person *sui juris* which results in the establishment for himself of a domicile of choice. And having regard to the fact that in many continental countries political nationality has been substituted for domicile as the criterion of the personal statute—in other words, civil societies have been identified with political ones: see above, pp. 24–31—it will be desirable to begin by examining how the view which is retained in England as to the legal bearing of domicile is affected when a country comes into consideration in which that legal bearing is assigned to political nationality, or in which it makes a difference whether a foreigner

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has had the authority of the government for establishing a domicile. As to the last point see above, p. 28.

§ 254. If an establishment be made in any country in such manner that by English law it would fix the domicile there, still no effect which the law of that country does not allow to it can be allowed to it in the character of domicile in England. In other words, no one can acquire a personal law in the teeth of that law itself.

Collier v. *Rivas*, 1841, 2 Cur. 855, Jenner; *Bremer* v. *Freeman*, 1856, Deane 192, Dodson; in which case it was held that according to English principles on domicile a testator had acquired a domicile in a foreign country, and that the effect of applying English principles on wills to that state of his domicile would have been to invalidate his will, contrary to the law of that country, which the court refused to do. See above, § 89. *Bremer* v. *Freeman* was reversed on appeal, 1857, 10 Mo. P. C. 306, Wensleydale; it being held that to invalidate the will was not contrary to the law of France, in which country the testatrix, without authority from the French government, had acquired a domicile according to English principles. In *Hamilton* v. *Dallas*, 1875, 1 Ch. D. 257, Bacon, where also a domicile according to English principles had been acquired in France without government authority, it was similarly held that there was no difference between the laws of England and France as to the effect of such domicile in the particular case.

§ 255. But if an establishment be made in England in such manner as by English law to fix the domicile there, its full effect according to English law will be allowed to it in England, notwithstanding that the country which the person has abandoned may claim to determine his personal law according to his continuing political nationality.

I submit this § on the ground of principle. There seems to be no reason why a person *sui juris* should not acquire a new personal law, with the consent of that law and in its country, although his former personal law may object to the change.

In *Brunel* v. *Brunel*, 1871, L. R., 12 Eq. 298, Bacon, the circumstance that the deceased had satisfied the conditions under which the French code declares the French character to be lost, without foreign naturalization, was treated as an argument in favour of his having acquired an English domicile.

The ground is now clear for considering, in principle, the mode in which a domicile of choice is established: the rules, so far as any such can be given, will then follow.

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§ 256. It was the Roman law that a person *sui juris* can establish for himself a domicile of choice *animo et facto*, by establishing for himself in fact a residence in the territory in question, combined with an *animus manendi* in that territory. The English law is the same, subject to three remarks, of which however only one is certain.

(1) The remark which is certain is that, the unity of domicile being with us a principle, the residence which is to create domicile must have a character that was not always required when the establishment of a new domicile did not necessarily imply the abandonment of the former one. It must be more permanent in intention, and more decisively preponderant over all other residences while it lasts. The *animus* referred to in the rule is not exactly the same. By what tests the preponderance and permanence required by English law are to be measured will be considered in §§ 264, &c.

(2) Next, the § must be read as subject to the doubt whether, under any understanding as to the preponderance and permanence of the residence, it now applies in England to the acquisition of domicile in a country not under Christian government. This doubt, which arises from *Tootal's trusts* and from what was said, though not from what was decided, in *Abd-ul-Messih* v. *Farra*, has been sufficiently explained in § 243 and the discussion preceding it.

(3) Thirdly, there is the doubt arising from the doctrine which may be called that of *Moorhouse* v. *Lord*—1863, 10 H. of L. 272—from the pointed manner in which it was laid down in that case by lords Cranworth and Kingsdown, and avowed by the former of those eminent judges to be required by "the modern improved views of domicile," though it did not then make its first appearance. According to that doctrine a domicile of choice, even in a Christian country, is not acquired by any residence, however preponderant and however permanent, unless the person in question has the intention of subjecting himself and his movable succession to the law of that country, or at least, if he does not think expressly of the law, the intention of so incorporating himself with the population of that country that the application of its law to him and to his

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movable succession must be considered to be in accordance with his feelings. There was at the time an impression that in *Moorhouse* v. *Lord*—and in *Whicker* v. *Hume*, 1858, 7 H. of L. 124, in which lord Cranworth preluded to the later case, but without expressing himself so clearly—it was designed to substitute political nationality for domicile as the ground of personal law, or at any rate to negative a domicile of choice as the ground of personal law unless accompanied by such circumstances as to infer a preference for the political nationality of the adopted territory. But a careful study of the speeches of the noble lords will show that it was the civil and not the political society of the adopted territory, with which they required that the person who established a domicile of choice should desire to incorporate himself. In the last edition of this book I used the doctrine of *Moorhouse* v. *Lord* as the primary basis of the §§, giving only as an alternative the older doctrine that domicile is transferred by a transfer of residence alone, if sufficient in respect of completeness and of permanence, without any further intention. But as time has passed and not much disposition has been shown to pursue the new path, I have now embodied the older doctrine in § 256 with the appended remark (1), and will discuss in the next few pages the newer doctrine with its bearings and the authorities for it.

The older doctrine attaches most importance to the authority and welfare of the society to which a person belongs by residence, a welfare which it cannot be denied may in some cases suffer, if the reluctance or hesitation of a resident to identify himself with that society is allowed to exempt him from subjection to its laws. Suppose for example that domicile were established as the basis of jurisdiction for divorce, as well as the test of the prohibited degrees in marriage: the country with which a person was most intimately connected by residence might well object to its laws on those subjects not being applied to him, because he came there from a country with which he desired to retain his civil connection. The newer doctrine attaches most importance to preserving the liberty and giving effect to the wishes of persons. Indeed it may be said to supplement the liberty of living abroad by liberty in living abroad. Let us suppose

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"the case of a person wishing to settle permanently in a country different from that of his domicile, but to retain as regards testamentary and matrimonial matters, and as regards civil status generally, the law of the country that he leaves": Wickens, in *Douglas* v. *Douglas*, 1871, L. R., 12 Eq. 644. If any one wished to settle in a country in the sense of establishing himself there with all his belongings, so as to become a member of its society, and found a family there if anywhere, and at the same time to retain the law of another country, he would, like many men, be wishing for incompatible things, and the doctrine of *Moorhouse* v. *Lord* would certainly not help him. But if Sir J. Wickens be understood as putting the case of a man who merely wished to establish his own personal residence in a country different from that of his domicile, and that permanently, at the same time deprecating any severance of his family relations from his domicile, then so to live abroad, while preserving the law of his old country as that by which, on his intestacy, his movable property shall be distributed among his kindred, very likely still resident there, is just what the doctrine of *Moorhouse* v. *Lord* would permit, the older doctrine refusing it.

With regard to the historical connections of the two doctrines, it scarcely needs to be remarked that that of *Moorhouse* v. *Lord* neither arose nor could have arisen on the ancient footing of domicile being residence viewed with no more technicality than is necessary for the purpose of jurisdiction. And with regard to the other ancient significance of domicile, namely its relation to municipal burdens, the notion that these could be escaped in a new actual residence, by protestations of clinging morally to the old one, is condemned *e converso* in a passage of the Digest quoted above on p. 284. But since law has come to be determined among us by domicile, and two other conditions have been combined with this, a vast increase in the habitual displacement of persons, and a growing reluctance to defeat their reasonable wishes by technical rules, it appears to me that the British legislator, including judges in their capacity of practical legislators, ought either to adopt the doctrine of *Moorhouse* v. *Lord* or to remove the basis of personal law from domicile to

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political nationality. And that views with regard to the change of domicile like those expressed in *Moorhouse* v. *Lord* have not arisen on the continent appears to me to be due to the movement which is taking place there in favour of political nationality as the test of personal law. That system, so far as it permits a man to live abroad while retaining his old law through not procuring himself to be naturalized, operates as another mode of satisfying those requirements of the age which are now in question.

It is unnecessary to quote the English authorities which supported the doctrine of § 256 with the appended remark (1) while it was undisputed. One of them however may be given as being very express, and at the same time one of the last before the newer doctrine was announced. In *Hoskins* v. *Matthews*, 1856, 8 D. M. G. 13, Turner said: "In this case I find nothing in the evidence to show that Mr. Matthews, when he left England, was in any immediate danger or apprehension. He was no doubt out of health, and he went abroad for the purpose of trying the effect of other remedies and other climates. That he would have preferred settling in England I have little doubt, but I think he was not driven to settle in Italy by any urgent necessity. I think that in settling there he was exercizing a preference and not acting upon a necessity, and I cannot venture to hold that in such a case the domicile cannot be changed. If domicile is to remain unchanged upon the ground of climate being more suitable to health, I hardly know how one could stop short of holding that it ought to remain unchanged also upon the ground of habits being more suitable to fortune. There is in both cases a degree of moral compulsion." Knight-Bruce dissented, which he could scarcely have done except on the footing of the newer doctrine, but without giving detailed reasons. He said however: "the whole of the evidence being considered, it does not appear to me to be proved that at any time after the year 1838 Mr. Matthews acquired a Tuscan domicile, or relinquished or lost his English domicile, or intended to acquire a Tuscan domicile, or to relinquish or lose his English domicile." The intention to transfer one's domicile is without importance, if its transfer is effected by law on the residence being transferred both in intention and in fact.

Then, in 1858, Cranworth said in *Whicker* v. *Hume*: "I think it is not inexpedient on questions of this sort to say that I think that all courts ought to look with the greatest suspicion and jealousy at any of these questions as to change of domicile into a foreign country. You may much more easily suppose that a person having originally been living in Scotland, a Scotchman, means permanently to quit it and come to England, or *vice versa*, than that he is quitting the United Kingdom in order to make his permanent home where he must for ever be a foreigner, and in a country where there must always be those difficulties which arise from the complication that exists, and the conflict, between the duties that you owe to one country and the duties which you owe to the other. Circumstances may be so strong as to lead irresistibly to the inference that a person does mean *quatenus in illo exuere patriam*. But that is not a presumption at which we ought easily to arrive, more especially in modern times, when the facilities for travelling and the various inducements for pleasure,

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for curiosity or for economy, so frequently lead persons to make temporary residences out of their native country." 7 H. of L. 159. These remarks are very pertinent on the footing of the doctrine of *Moorhouse* v. *Lord*, for it is much less likely that a man should intend to transfer all his civil ties to a country politically foreign than to another member of the same empire. But they would scarcely be pertinent if the only intention necessary to be proved was that which is involved in a change of residence, the law then superinducing the transfer of domicile, for it is every day's experience that men readily establish their permanent residence in countries politically foreign. If the conflict foreshadowed by lord Cranworth became at all serious, the residence could as easily be changed again; but the possibility of this, without an expectation of it, would not preserve the domicile of origin on the old theory.

The new doctrine, thus preluded to, was distinctly announced in *Moorhouse* v. *Lord*, 1863, 10 H. of L 272. Cranworth said that Mr. Cochrane "eventually established himself in a house or apartments which he took unfurnished, and for which he got expensive furniture, meaning if you please to live there always. But then that does not change the domicile. In order to acquire a new domicile, according to an expression which I believe I used on a former occasion, and which I shall not shrink on that account from repeating, because I think it is a correct statement of the law, a man must intend *quatenus in illo exuere patriam*. It is not enough that you merely mean to take another house in some other place, and that on account of your health or for some other reason you think it tolerably certain that you had better remain there all the days of your life. That does not signify. You do not lose your domicile of origin or your resumed domicile merely because you go to some other place that suits your health better, unless indeed you mean either on account of your health or for some other motive to cease to be a Scotchman, and become an Englishman or a Frenchman or a German. In that case, if you give up everything you left behind you and establish yourself elsewhere, you may change your domicile. But it would be a most dangerous thing in this age, when persons are so much in the habit of going to a better climate on account of health, or to another country for a variety of reasons, for the education of their children, or from caprice or for enjoyment, to say that by going and living elsewhere, still retaining all your possessions here, and keeping up your house in the country as this gentleman kept up his house at Clippens, you make yourself a foreigner instead of a native. It is quite clear that that is quite inconsistent with all the modern improved views of domicile." And Kingsdown said: "Upon the question of domicile I would only wish to say this, that I apprehend that change of residence alone, however long and continued, does not effect a change of domicile as regulating the testamentary acts of the individual. It may be and it is a necessary ingredient. It may be and it is strong evidence of an intention to change the domicile, but unless in addition to residence there is intention to change the domicile, in my opinion no change of domicile is made. I think the distinction which has been taken by my noble and learned friend in the chair" (Cranworth) "is a perfectly sound one. The same has been adverted to by Dr. Lushington in the case of *Hodgson* v. *De Beauchesne*. A man must intend to become a Frenchman instead of an Englishman." The passage here alluded to is probably that in which Dr. Lushington said that "a settled domicile in a country imports an allegiance to the country, very different from a mere

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obedience to its laws during a temporary residence:" *Anno* 1858, 12 Mo. P. C. 319. And this may be connected with the same learned doctor's implication in *Maltass* v. *Maltass* (see above, p. 293), that the *animus* necessary for a change of domicile is something more than an intention of complete and permanent residence, though the ground for doubting such further intention in that case may seem to have been cut away by the doctor's opinion that, if it had existed, Mr. Maltass's father would still have been subject to English law and not to the general law of Turkey. See also above, p. 296, as to Chitty's view in *Tootal's trusts.*

Kingsdown then went on to say: "I can well imagine a case in which a man leaves England with no intention whatever of returning, and not only with no intention of returning but with a determination and certainty that he will not return. Take the case of a man labouring under a mortal disease. He is informed by his physicians that his life may be prolonged for a few months by a change to a warmer climate, that at all events his sufferings will be mitigated by such change. Is it to be said that if he goes out to Madeira he cannot do that without losing his character of an English subject, without losing the right to the intervention of the English laws as to the transmission of his property after his death, and the construction of his testamentary instruments? My lords, I apprehend that such a proposition is revolting to common sense and the common feelings of humanity." It must be admitted that so revolting a conclusion cannot fairly be charged even on the old doctrine. The case put would amount to the "immediate danger or apprehension," the "cogent necessity," contemplated and reserved by Turner, as above quoted from *Hoskins* v. *Matthews.* An intention to die in a country is hardly one to reside there. But when law is delivered in a public speech, the illustrations which accompany it must not be pressed too closely. The most authoritative part of lord Kingsdown's speech in *Moorhouse* v. *Lord* is his approval of the distinction which lord Cranworth drew in favour of "modern improved views of domicile."

In *Sharpe* v. *Crispin*, 1869, Wilde (Penzance) said: "It was ably and forcibly argued that George said nothing and did nothing in the course of his life from which the court could infer a deliberate resolve on his part to surrender his Portuguese domicile and replace it by an English one. That such an inference could alone in the eye of the law destroy his domicile of origin is apparent from the numerous authorities which exist on this subject, confirmed as they are by the decision of the house of lords in the case of *Moorhouse* v. *Lord.*" L. R., 1 P. & M. 616. On the other hand, in the same year, Westbury said in *Udny* v. *Udny:* "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time." L. R., 1 S. & D. A. 458. In the same case Westbury corrected the impression that by the doctrine of *Moorhouse* v. *Lord* it had been intended to substitute political nationality for domicile, as an element in private law.

In *Douglas* v. *Douglas*, 1871, L. R., 12 Eq. 617, Wickens contrasted the two doctrines, and was unable to satisfy himself that that of *Moorhouse* v. *Lord* is the law of England, though he would have liked to do so. He appears however to have considered that that doctrine refuses to admit a change of domicile

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without the person having distinctly contemplated a change of law, which is not how I understand it. The distinction may be fine, but I submit that it is real. For example, of two Englishmen who establish their residences in Portugal, the one may cling to the English society he can find there, and may strive to maintain an English feeling in his children, by having them educated in England and otherwise; the other may by preference cultivate Portuguese society for himself and his family, and bring up his children as Portuguese. Neither may have thought of law till the occasion arrived, but when it came to the marriage of his children, the one would probably expect his authority with regard to it to be measured by English law, the other by Portuguese. And the doctrine of *Moorhouse* v. *Lord*, as I understand it, would not refuse to admit the change of domicile in the latter case.

Rules as to Change of Domicile.

§ 257. Men, unmarried women, widows, divorced women, and possibly wives judicially separated *a mensa et toro*—see § 253 as to this—being of full age and of sound mind, change their domiciles by a combination of intention and fact, *animo et facto* as it is said.

If it is asked whether the condition of full age is necessary in the case of those who have once been emancipated by marriage, the answer will be that this must depend on the personal law. A minor who on marriage is relieved by the law of his country from all incapacity will, of course, be as capable for the purpose of changing his domicile as for any other purpose. Marriage does not by the law of England relieve a minor from all incapacity, or therefore give him the power of changing his domicile.

Forbes v. *Forbes*, 1854, Kay 341, at p. 355; Wood.

§ 258. For a change of domicile, the intention which is in general necessary is that of establishing in the new country a residence with a sufficient character of permanence. This is subject to the possibility that the further intention required by the doctrine of *Moorhouse* v. *Lord* may be exacted, and to the remark that, whether this be so or not, when the domicile which is abandoned was itself acquired by choice, the intention may be limited to that of abandoning it, since if no intention be directed towards any other country, the domicile of origin will be reacquired by reverter on the occurrence of the necessary fact, which it will presently be seen consists merely in leaving the country in which a domicile had been acquired.

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From the necessity of intention it follows that domicile cannot be changed by any residence not resulting either from a choice immediately applied to the residence, or from a duty freely undertaken, as in the case of § 275.

Not by lying in prison: *Burton* v. *Fisher*, 1828, Milward 183, Radcliff. Not by 22 years' actual residence in another country, in lodgings, hotels and boarding houses in different places, with no clear intention of making a home there: *Patience* v. *Main*, 1885, 29 Ch. D. 976, Chitty.

But where the intention is proved, the motive for it is of no importance.

Turner, as quoted above on p. 307, is in accordance with the current of authority in rejecting as irrelevant all inquiry into "moral compulsion." The very distinction which he drew would probably have been better put on the ground that going to die in a country is not going to reside there, than on any difference between preference and necessity.

§ 259. The fact necessary for a change of domicile is in general merely that of leaving the old country, but if the domicile in the old country was one of origin, there must be the further fact of arriving in the new country. The actual duration of residence in the new country may be important as evidence of intention, but is never important as a legal condition of the change of domicile.

An ineffectual attempt to leave a country is not a sufficient fact: *Re Raffenel* 1863, 3 S. & T. 49, Cresswell. It is not enough to intend leaving the country: *Re Marrett, Chalmers* v. *Wingfield*, 1887, 36 Ch. D. 400; Cotton, Bowen and Fry, affirming Stirling. Professor Dicey considers that the fact necessary for a change of domicile includes arrival in the new country, even when the domicile in the territory quitted was one of choice: The Law of Domicile, p. 93.

§ 260. The combination of §§ 258 and 259 leads to the following rules for different cases.

(1) Change from domicile of origin to one of choice. If the person dies at sea, or otherwise *in itinere* between the old country and the new, his last domicile is that of origin.

I do not know that the case has arisen, but I have incorporated the point in § 259 because the general tenour of the authorities convinces me that it would be so decided.

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(2) Intentional resumption of the domicile of origin, after possessing a domicile of choice. In the event of death *in itinere*, the last domicile is that of origin.

Re Bianchi, 1852, 3 S. & T. 16, Cresswell.

(3) Abandonment of a domicile of choice without a sufficient intention being directed towards any other country, and consequent commencement of an unsettled life. The domicile of origin reverts on the abandonment of the domicile of choice, and continues during the unsettled life.

Udny v. *Udny*, 1869, L. R., 1 S. & D. A. 441; Hatherley, Chelmsford, Westbury, Colonsay. This case overruled *Munroe* v. *Douglas*, 1820, 5 Madd. 379, Leach; and was followed in *King* v. *Foxwell*, 1876, 3 Ch. D. 518, Jessel.

(4) Change from one domicile of choice to another. In the event of death *in itinere*, the last domicile is the one towards which the person is journeying.

Leach, in *Munroe* v. *Douglas*, 1820, 5 Madd. 405; approved by Wood in *Forbes* v. *Forbes*, 1854, Kay 354. This part of Leach's doctrine does not seem to have been censured in *Udny* v. *Udny*. But if Professor Dicey is right in the opinion quoted under § 259, the last domicile will be that of origin, which will be deemed to have reverted on quitting the territory in which a domicile had been acquired.

§ 261. Where a person's domicile has been changed under § 247, 249, 250, 252, or 253, between the date of his birth and that when he first acquired the power of changing his domicile for himself, it is the domicile attributed to him by law at the latter date which must be understood as his domicile of origin, in applying §§ 258, 259, and 260.

Whenever the domicile of origin is expressly defined, no larger meaning is given to it than that of the domicile attributed by law at birth, as in § 244. But the principles on which the doctrines of §§ 258 and 259 have been founded by the authorities for them appear to require this extension of the meaning of the term "domicile of origin," as employed in those authorities.

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§ 262. Since there is always a domicile to start from when the domicile of a person *sui juris* is in dispute, the burden of proof lies on the party asserting the change of domicile.

§ 263. And this burden will be less easily satisfied where the new domicile alleged is politically foreign to the old one, than when the contest lies between two countries equally British.

Cranworth, in *Whicker* v. *Hume*, as quoted above, p. 307. But consider the suggestion I have made on p. 308, that this is only true on the footing of the doctrine of *Moorhouse* v. *Lord*.

§ 264. With regard to what in § 258 has been called a residence with a sufficient character of permanence, this excludes all contemplation of any event on the occurrence of which the residence would cease.

The old English doctrine was that all desire or intention of return to the old country was not excluded, if only the event on which the return depended was highly uncertain and regarded as remote. Thus the domicile might be changed by residence abroad for the sake of health, if such recovery as to permit return was very improbable, notwithstanding the desire to return in case of recovery. Or it might be changed by residence abroad as a merchant, with the intention of remaining till a fortune should be made and then returning.

Thurlow in *Bruce* v. *Bruce*, 1790, 2 Bos. & Pul. 230, note; Lushington in *Anderson* v. *Laneuville*, 1854, 9 Mo. P. C. 334; Campbell in *Aikman* v. *Aikman*, 1861, 3 Macq. 858.

But the doctrine of the § is not only a necessary consequence from that of *Moorhouse* v. *Lord*, but has been adopted in modern times even by judges who have not declared their adhesion to the latter doctrine.

Chelmsford in *Moorhouse* v. *Lord*, 1863, 10 H. L. 285, 286: Martin and Channell, but not Pollock, in *Re Capdevielle*, 1864, 2 H. & C. 985: Romilly in *Jopp* v. *Wood*, 1864, 34 Beav. 88, and Knight-Bruce and Turner in the same case, 1865, 4 De G. J. & S. 616—if indeed Martin, Channell and Knight-Bruce are not to be considered as adopting even the distinctive doctrine of Cranworth. See above, p. 307, as to the last named of the three. In *Doucet* v. *Geoghegan*, 9 Ch. D. 441, Malins, 1877; affirmed in 1878 by Jessel, James and Brett; a

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Frenchman was held to have acquired an English domicile, notwithstanding "some declarations in casual conversations of an intention to return to France when he had made money enough." But the case rather proves that such declarations cannot "outweigh all the acts of a man's life and every document executed by him," than that an intention to return after making a fortune, if sufficiently proved, will be still held not to prevent a change of domicile.

§ 265. Nevertheless a residence in India for mercantile purposes, not having a prefixed duration, still produces an Anglo-Indian domicile, although the intention in such cases is almost always to remain only till a fortune is made and then to return to Europe. This rule was originally established on the footing of the old doctrine mentioned under the last §, and it has survived as an exception to the new doctrine.

Cranworth and Chelmsford themselves, in *Moorhouse* v. *Lord*, admitted the Anglo-Indian domicile of a Scotchman who had gone out to India in the civil service of the East India Company; 10 H. L. 281, 284; though his correspondence "showed that he never had any intention of remaining in India longer than to make his fortune, when he would return to Scotland;" Kindersley, in *Allardice* v. *Onslow*, 1864, 10 Jur. N. S. 352. There Kindersley observed that the argument in favour of the retention of the domicile of origin was stronger in the case of one who went out in the service of a company having its head quarters in London, than in that of one who went out for private speculation; and he decided in favour of the Anglo-Indian domicile of a Scotchman in the latter predicament.

It must be admitted that there are strong reasons of convenience in favour of the Anglo-Indian domicile in these cases. Since the Anglo-Indian law is nearly the same as that of England or Ireland, the decision in its favour makes little or no difference if the domicile of origin was in England or Ireland, except so far as to exempt the person's succession from the home legacy duty. And where the domicile of origin was Scotch, the merchant, if he should ever return to Europe, is just as likely to settle in England as in Scotland; while if attributing a Scotch domicile to him should make it necessary to apply Scotch law in India, that would be even more inconvenient than it is found to be to apply it in London, there being so much less opportunity there of obtaining accurate information about it.

Professor Dicey's views on the relation of Anglo-Indian domicile

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to the general law of domicile differ from those here stated, and should be seen in his treatise on the Law of Domicile, pp. 140—143 and 337, 338.

§ 266. Where a question of domicile turns on disputed intention, the declarations of the person in question are admissible as evidence, whether they were made orally or are contained in private writings or legal documents. If living, he may testify as a witness to his intentions. But it will be permitted to question the sincerity of such declarations or testimony, or the accuracy of the deponent's memory as to his intentions at a former time. And it must always be carefully considered whether the intentions which the declarations or testimony tend to prove are such as are really important. Thus, if the doctrine of *Moorhouse* v. *Lord* be rejected, a sincere and express declaration of an intention to retain an old domicile, made with full understanding of the point involved, may be overruled by evidence of the declarant's intention to pass the rest of his days in another country.

The case just put occurred in *Re Steer*, 1858, 3 H. & N. 594; Pollock, Bramwell, Watson. See declarations of intention dealt with in *Crookenden* v. *Fuller*, 1859, 1 S. & T. 441, Cresswell; and in *Doucet* v. *Geoghegan*, quoted above, p. 313. The person whose domicile was in question was examined as a witness to his intentions in *Maxwell* v. *McClure*, 1860, 3 Macq. 852, 6 Jur. N. S. 407; and in *Wilson* v. *Wilson*, 1872, L. R., 2 P. & M. 435, in which case Wilde avowed that, on the strength of the party's testimony, he had come to a different conclusion as to his domicile from that to which he should have come in its absence. "The question is here not so much whether the circumstances of his English residence tend to prove English domicile as whether, the man swearing to his intention to create an English domicile, there are such circumstances on the other side as warrant the court in throwing over his oath and disbelieving him:" ib., p. 445.

§ 267. Acts implying a choice of domicile stand on the same footing as oral or written declarations; for example, marrying or making a will in such manner that the validity of the marriage or the will depends on the domicile being in a certain country.

Doucet v. *Geoghegan*, 1878, 9 Ch. D. 441, Jessel and James.

We now come to the criteria that are commonly referred to as between two residences, in order to determine, or aid in deter-

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mining, towards which residence such intention as is deemed to be important in a case of domicile was directed.

§ 268. The residence of a man's wife and family is the most important among the external criteria of his domicile, but is not always decisive.

Forbes v. *Forbes*, 1854, Kay 341, Wood: *Platt* v. *Att.-Gen. of New South Wales*, 1878, 3 Ap. Ca. 336, Peacock: *D'Etchegoyen* v. *D'Etchegoyen*, 1888, 13 P. D. 132, Hannen. And this criterion is not the less important because the residence may have been chosen at the wife's wish, and be supported by her fortune: *Aitchison* v. *Dixon*, 1870, L. R., 10 Eq. 589, James. See under § 270.

§ 269. A merchant's town house is a more weighty criterion than his country house, but the country house of a landed proprietor not engaged in trade is a more weighty criterion than his town house.

Arden (Alvanley) in *Somerville* v. *Somerville*, 1801, 5 Ves. 789.

§ 270. If a person exercizes political or municipal functions in a certain place, this furnishes an important argument as against a place where he does not possess or neglects to exercize them.

Kindersley in *Drevon* v. *Drevon*, 1864, 34 L. J., N. S., Ch. 137. In *Maxwell* v. *McClure*, 1860, Campbell referred to this argument as one of those for affirming a decision of the Court of Session, by which the domicile was determined adversely to the criterion in § 268: 6 Jur. N. S. 408, and 3 Macq. 859.

§ 271. No great weight is attached to the circumstance of a person's residing in lodgings or in a house of his own.

Langdale in *Whicker* v. *Hume*, 1851, 13 Beav. 395; Cranworth in the same case, 1858, 7 H. L. 157.

§ 272. Importance has been attached to the following criteria.

Length and continuity of residence.

Lushington in *Hodgson* v. *De Beauchesne*, 1858, 12 Mo. P. C. 328, 330.

Naturalization in the new country.

This was probably the circumstance which chiefly outweighed the evidence of

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an intention to return in *Stanley* v. *Bernes*, 1830, 3 Hagg. Eccl. 373, Nicholl, and 1831, ib., p. 447, before the delegates.

In which country a person has his children educated, in the absence of special reasons for his choice.

Kindersley in *Drevon* v. *Drevon*, 1864, 34 L. J., N. S., Ch. 139.

Marrying a daughter, apprenticing a son, and buying a partnership for him in the new country.

Stevenson v. *Masson*, 1873, L. R., 17 Eq. 78, Bacon.

Removal of the remains of deceased children to the new country.

James in *Haldane* v. *Eckford*, 1869, L. R., 8 Eq. 642.

In which country a testator directs his property to be invested, and from which country he chooses the trustees of his will and the guardians of his children.

Kindersley in *Drevon* v. *Drevon*, 1864, 34 L. J., N. S., Ch. 136. "By her will she left her property to English trustees, and to be administered according to English law:" Pollock in *Att.-Gen.* v. *Wahlstatt*, 1864, 3 H. & C. 387.

It is evident that all arguments drawn from the conduct of the person whose domicile is in question with regard to his children, though not unimportant on any theory, must have a peculiar importance on the footing of the doctrine of *Moorhouse* v. *Lord*.

§ 273. A domicile in any part of the British dominions is not changed by employment in the service of the British crown, whether military, naval or civil, even though such employment involve residence elsewhere, with the exception however as to India expressed in § 275. On the other hand, such service is no obstacle to the acquisition of any domicile not inconsistent with its duties.

So far as the question of domicile lies between two British places, these rules follow from the circumstance that the service of

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the crown involves no lasting tie to one part of the British dominions rather than to another.

A British domicile was retained, notwithstanding employment elsewhere in the military service of the crown, in *Dalhousie* v. *McDouall*, 1840, 7 C. & F. 817, Cottenham and Brougham; *Re Macreight*, *Paxton* v. *Macreight*, 1885, 30 Ch. D. 165, Pearson; *Lauderdale Peerage*, 1885, 10 Ap. Ca. 692, 738, Selborne, Blackburn, Watson, Bramwell, Fitzgerald. And that such would be the case was also laid down in *Exp. Cunningham*, *re Mitchell*, 1884, 13 Q. B. D. 418: Baggallay, Cotton, Lindley.

A British domicile was retained notwithstanding employment elsewhere in the naval service of the crown, in *Brown* v. *Smith*, 1852, 15 Beav. 444, Romilly, and *Re Patten*, 1860, 6 Jur. N. S. 151, Cresswell; and in *Att.-Gen.* v. *Rowe*, 1862, 1 H. & C. 31, Pollock, Bramwell and Wilde, notwithstanding employment elsewhere in its civil service.

One British domicile was exchanged for another during employment in the service of the crown, in *Tovey* v. *Lindsay*, 1813, 1 Dow. 133, Eldon, military; and *Re Smith*, 1850, 2 Robertson 332, Fust, civil.

And when one of the places in question is politically foreign, the person residing there in the diplomatic or consular service of the British crown, the rule that a previous British domicile is not necessarily lost by such residence still applies. If the service be diplomatic, it might perhaps be deemed incompatible with its duties to acquire the foreign domicile; see § 277; but there would seem to be nothing to prevent a person in the consular service from acquiring a domicile, if so minded, in the country where he is employed, it being of frequent occurrence that foreigners are chosen for such employment in their respective countries.

"I take it to be clear that a person domiciled in England, and going abroad either as an ambassador or consul, would not in any way by the fact of his residence in a foreign country alter his domicile. . . . . But if already there domiciled and resident, the acceptance of an office in the consular service of another country does nothing to destroy the domicile." Wilde, in *Sharpe* v. *Crispin*, 1869, L. R., 1 P. & M. 613, 617. See also Lushington in *Maltass* v. *Maltass*, 1844, 1 Robertson 79: Fust in *Gout* v. *Zimmermann*, 1847, 5 N. of C. 445; and the next §.

§ 274. Neither is a domicile, previously enjoyed in any part of the British dominions, necessarily affected by diplomatic or consular employment in the British dominions on behalf of a foreign state.

Heath v. *Samson*, 1851, 14 Beav. 441, Romilly; *Att.-Gen.* v. *Kent*, 1862,

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1 H. & C. 12, Pollock, Martin, Bramwell, Wilde; both cases of diplomatic employment, and the last establishing that its acceptance did not prevent the person's movable property from being subject to legacy duty on his death, as in any other case of a person dying domiciled in England.

§ 275. But residence in India in the special Indian service of the crown, as formerly in the service of the East India Company, whether military, naval, or such civil service as is usually entered on as a profession for life, produces an Anglo-Indian domicile.

This exception to the general rule in § 273 is parallel to the exception made by § 265 to the general rule in § 264. Both are survivals of the old doctrine that the domicile was changed by a residence abroad of indefinite and presumably long duration, notwithstanding the distinct contemplation of return; and both have in their favour the reasons of convenience mentioned on p. 314. An Anglo-Indian domicile was never acquired by employment in the mercantile marine of the East India Company, in which the engagement involved no permanent obligation to serve in the East Indies, but usually terminated with the voyage.

Aikman v. *Aikman*, 1861, 3 Macq. 855, Campbell, and 880, Wensleydale.

Nor by the acceptance of high office in India comparatively late in life.

Att.-Gen. v. *Rowe*, 1862, 1 H. & C. 31, Pollock, Bramwell and Wilde.

But the authorities quoted for § 265 show that so far as an Anglo-Indian domicile was ever acquired by service it is so still.

§ 276. An officer who has acquired an Anglo-Indian domicile pursuant to § 275, but has attained a rank at which he is permitted to reside where he pleases, is not prevented from changing his domicile, at least to another British territory, by the liability to be ordered back to India under which he lies as long as he retains his commission.

Wood in *Forbes* v. *Forbes*, 1854, Kay 359: *Att.-Gen.* v. *Pottinger*, 1861, 6 H. & N. 733; Pollock, Martin, Bramwell.

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But if he is absent from India only on furlough he cannot change his domicile, notwithstanding that he hopes to attain before the expiration of his furlough a rank at which he will be permitted to reside where he pleases.

Craigie v. *Lewin*, 1843, 3 Curteis 435, Fust.

§ 277. The point reserved in § 276, whether the domicile of a country politically foreign to England can be acquired by an Anglo-Indian officer who is permitted to reside where he pleases, equally arises in the case of other persons in British service whose duties are not such as to preclude their in fact residing abroad. In all these cases the question whether the residence is accompanied with a sufficient intention of permanence for the acquisition of domicile must be the same for a foreign as for a British country, and will include considerations as to the probability of the person being recalled to the active performance of his duties, and as to the conduct he would pursue in such an event, as for example by giving up his service rather than obey the call, by obeying it but leaving his family in his adopted country in the hope of his speedy return, and so forth. The negative can be grounded as a general proposition only on the assumption that the intention necessary for the acquisition of domicile implies such feelings towards the adopted country that, by a presumption *juris et de jure*, holding them towards a foreign country cannot be imputed to a person still remaining in British service. Such an assumption is scarcely intelligible except on the footing of the doctrine of *Moorhouse* v. *Lord*, and even on that footing it seems that, so long as private persons are allowed to change their personal law without changing their political nationality, the possession of a grade in the public service may be an argument against the probability, but not against the permissibility, of its holder doing the same. What has been said under § 273 about the diplomatic and consular services may here be compared. Certainly the diplomatic service presents a much stronger case than any other against the acquisition of a foreign domicile. The fiction that the hotel of an embassy is a part of the soil of the ambassador's country would

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formerly, no doubt, have been used as an argument against the existence of the fact which is no less necessary than the intention; but if the question should now arise, it will probably be discussed on real and not on fictitious grounds.

In *Hodgson* v. *De Beauchesne*, 1858, 12 Mo. P. C. 319, Lushington said: "we do not think it necessary for the decision of this case that we should lay down as an absolute rule that no person, being colonel of a regiment in the service of the East India Company and a general in the service of her majesty, can legally acquire a domicile in a foreign country. It is not necessary for the decision of this case to go so far; but we do say that there is a strong presumption of law against a person so circumstanced abandoning an English domicile and becoming the domiciled subject of a foreign power."

A peer of the United Kingdom is not prevented by his parliamentary or other political duties from acquiring a domicile in a country politically foreign: *Hamilton* v. *Dallas*, 1875, 1 Ch. D. 257, Bacon.

§ 278. When a person whose domicile is non-British enters the service of the British crown, he does not thereby necessarily change his domicile, but he may acquire a domicile in that part of the British dominions in which his duties oblige him to reside, if he displays the intention which is necessary for that purpose. This will be the case if the service is likely to be permanent, and he displays the intention of remaining in it.

Urquhart v. *Butterfield*, 1887, 37 Ch. D. 357, 377; Cotton, Lindley, Lopes.

As to the case of military or naval service, in *exp. Cunningham, re Mitchell*, 1884, 13 Q. B. D. 418, Cotton cautiously said: "no doubt, if a foreigner enters the British army and resides in England his domicile will be in England": p. 423, which does not conflict with the doctrine laid down in the §. In the same case Baggallay delivered as a "rule of law," that "a subject of Her Majesty entering into the military or naval service of a foreign power acquires a domicile in the country of that power": p. 421. No authority was cited for this, and to apply the converse would require a rule as to the particular British domicile which a foreigner entering British military or naval service would acquire independent of intention. It would be difficult to say that that domicile was in England, if his duties called him to another part of the British dominions. In *President of the United States of America* v. *Drummond*, 1864, 33 Beav. 449, Romilly said with reference to a person about whose origin and antecedents nothing was known: "he obtained a commission in the English army, which would give him an English domicile." This may be admitted under the circumstances, and probably was not meant to be applied further.

§ 279. A political refugee retains his domicile, unless he settles in a new country abandoning the hope of return.

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De Bonneval v. *De Bonneval*, 1838, 1 Curt. 856, Jenner; *Re D'Orléans*, 1859, 1 S. & T. 253, Cresswell. This § results as well from § 264 as from the doctrine of *Moorhouse* v. *Lord*.

Trade Domicile in Time of War.

The student must be cautioned against confounding the trade domicile, by which the belligerent or neutral character of property is determined for the purposes of maritime war, with the subject of this chapter. The two are distinguished by Dr. Lushington in *Hodgson* v. *De Beauchesne*, 1858, 12 Mo. P. C. 313. As illustrations of the difference it may be mentioned that "a man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries:" Sir W. Scott, in *The Jonge Klassina*, 1804, 5 C. Rob. 302. Also that "the party becomes clothed with a new character from the period when he first takes steps *animo removendi* to abandon his former domicile, and *animo manendi* to acquire a new one:" Lushington in *The Baltica*, 1855, Spinks, Adm. 267.

The subject of this kind of domicile will not be pursued further here, because it belongs to public international law, and enough has been shown to enforce the impropriety of arguing from the one domicile to the other on any point.

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CHAPTER XV.

BRITISH NATIONALITY.

ALTHOUGH political nationality is of little importance to private international law as professed and applied in England, the rules on which it depends are of interest in connection with our subject, in view of the growing tendency on the continent to substitute it for domicile as the criterion of the personal statute and jurisdiction.

Unfortunately those rules are far from being the same in all countries. They result almost everywhere from a conflict between the feudal principle of allegiance determined by birth on the soil, and the Roman principle of citizenship determined by descent; but the respective proportions in which those principles are combined, and the methods used for combining them, differ widely. All that will be done here will be to exhibit the rules now in force as to the British character and its loss. It will be superfluous constantly to repeat the word "political:" if "nationality" or "character" could leave a doubt, "British" would prevent it, since the civil character may be English, Scotch or other, but not British, the empire having no common civil law.

Natural-born Subjects at Common Law.

§ 280. British nationality results from birth in the British dominions, except in the case of a child born to an enemy father at a place in hostile occupation.

At common law the British character was imposed, and not merely offered for acceptance. *Æneas Macdonald's Case*, 1747, 18 State Trials 857, Lee; where the prisoner, who was carried to France in his early infancy, and had resided there till he came over and took part in the rebellion of 1745 under a French

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commission, the two countries being then at war, was convicted of high treason but pardoned on conditions.

"But if enemies should come into any of the king's dominions, and surprise any castle or fort, and possess the same by hostility and have issue there, that issue is no subject to the king though he was born within his dominions, for that he was not born under the king's ligeance or obedience." *In Calvin's Case*, 7 Coke 18 a.

§ 281. "If any of the king's ambassadors in foreign nations have children there of their wives, being Englishwomen, by the common laws of England they are natural-born subjects." In *Calvin's Case*, 7 Coke 18 a. The condition that the wives are to be Englishwomen is certainly now superfluous: see § 294. And it is doubtful whether it was necessary even in Coke's time: *Bacon* v. *Bacon*, 1641, Cro. Car. 601, Brampston, Croke and Berkley. The principle does not extend at common law to children born abroad to soldiers or sailors on service: *De Geer* v. *Stone*, 1882, 22 Ch. D. 243, Kay.

It is stated by Dyer, in a note on p. 224a of his Reports, that it was adjudged in Tr. 7 E. 3 that children of subjects born beyond the sea in the service of the king shall be inheritable. But this is a mistake. I searched the roll with the kind assistance of Mr. Selby, and we found that Dyer misread or misunderstood the words *prædicto Johanne filio ipsius Edwardi antenato in partibus marinis tunc existente*, which mean that a certain John le Botiller, an elder son of Edward, was then living beyond sea, not that he had been born beyond sea.

Natural-born Subjects by Statute.

As to the act 25 Edw. 3, st. 1, see *De Geer* v. *Stone*, 1882, 22 Ch. D. 243, Kay and the authorities there cited.

§ 282. "All children born out of the ligeance of the crown of England or of Great Britain, or which shall hereafter be born out of such ligeance, whose fathers were or shall be natural-born subjects of the crown of England or of Great Britain at the time of the birth of such children respectively, ... are hereby declared to be natural-born subjects of the crown of Great Britain, to all intents constructions and purposes whatsoever." St. 4 Geo. 2, c. 21, s. 1; interpreting and substantially repeating st. 7 Anne, c. 5, s. 3.

Except such "whose fathers at the time of the birth of such children respectively were or shall be attainted of high treason by

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judgment outlawry or otherwise, either in this kingdom or in Ireland;

"or whose fathers at the time of the birth of such children respectively, by any law or laws made in this kingdom or in Ireland, were or shall be liable to the penalties of high treason or felony in case of their returning into this kingdom or into Ireland without the license of his majesty his heirs or successors, or of any of his majesty's royal predecessors;

[This means, where the penalties in question are incurred by and for the return, not where the return might make it possible to enforce them for some other fact by which they had been incurred: *Fitch* v. *Weber*, 1847, 6 Ha. 51, Wigram.]

"or whose fathers at the time of the birth of such children respectively were or shall be in the actual service of any foreign prince or state then in enmity with the crown of England or of Great Britain." St. 4 Geo. 2, c. 21, s. 2.

There is an important qualification of the character of a natural-born subject conferred by st. 7 Anne, c. 5, s. 3, and st. 4 Geo. 2, c. 21, s. 1. For st. 13 Geo. 3, c. 21, recites that "no provision hath hitherto been made to extend farther than to the children born out of the ligeance of his majesty, whose fathers were natural-born subjects of the crown of England or of Great Britain"; and lays down in s. 1 that "all persons born or who hereafter shall be born out of the ligeance of the crown of England or of Great Britain, whose fathers were or shall be by virtue of" st. 4 Geo. 2, c. 21, s. 1, "entitled to all the privileges of natural-born subjects of the crown of England or of Great Britain . . . . . are hereby declared and enacted to be natural-born subjects of the crown of Great Britain to all intents constructions and purposes whatsoever, as if he and they had been and were born in this kingdom." The recital preceding the enactment is correct, but the reference which in the enactment itself is made to st. 4 Geo. 2, c. 21, is incorrect, for the fathers in question had not been declared to be entitled to all the privileges of natural-born subjects, but to be natural-born subjects. Since however the enactment was superfluous unless the legislature

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considered that st. 7 Anne, c. 5, and st. 4 Geo. 2, c. 21, when they declared certain children to be natural-born subjects to all intents whatsoever, contained an exception of the intent of figuring as natural-born subjects in a further application of those acts of parliament to their own children, it follows that the legislature of 13 Geo. 3 intended the same exception to be contained in its own enactment; and the joint effect of all the statutes is as next follows.

§ 283. No children, neither whose fathers nor whose paternal grandfathers were born within the British dominions, have been made British subjects by act of parliament.

In 1795 Frederick Christian Rynhart, great-grandson of Godert de Ginkel first earl of Athlone, was admitted to his seat in the Irish house of lords although no one of the family had been born in the United Kingdom; but it does not appear that there had been any report on his case by the attorney-general. Journals of Irish house of lords, 10 March 1795; evidence of Rt. Hon. C. W. W. Wynn before Commons' select committee on laws affecting aliens, 1843, p. 69; 2 Lodge's Peerage of Ireland 157. This precedent, for what it was worth, was opposed to § 283; and in the report of the committee just named, p. x, it is stated that, on a case raising the question in connection with the title to land, five of the most eminent lawyers in the country advised one way and five the other. The doctrine of § 283 has now been established by *De Geer* v. *Stone*, 1882, 22 Ch. D. 243, Kay.

Naturalization, Denization, and Resumption of British Nationality.

§ 284. British nationality is acquired either by naturalization, and this either through a special act of parliament or under the Naturalization Act 1870, or by denization.

"An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights powers and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect."

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Naturalization Act 1870, s. 7. It will be observed that this enactment stops short of saying that the alien shall be deemed a natural-born subject, and it is therefore not to be assumed that his children born abroad after his naturalization will be British subjects by force of the acts quoted in § 282, even independent of the presumption arising from st. 13 Geo. 3, c. 21, as to the interpretation of a natural-born subject in those acts. See *Re Bourgoise*, 1889, 41 Ch. D. 310, Kay and Cotton, Lindley and Bowen, where it was also discussed whether the acceptance of a certificate of naturalization under this enactment causes the loss of French nationality.

§ 285. Letters of denization may be granted by the crown. The difference between their effect and that of naturalization is that a denizen becomes a British subject from the date of the letters but not as from that of his birth, while a naturalized person is placed in the United Kingdom in a position equivalent to that of a natural-born subject, as has been seen in the last §. This difference was important so long as aliens could not take or hold land, for a denizen, the defect of heritable blood not being cured in him, could not inherit land, nor could his issue born before his denization inherit it from him. The only practical difference now remaining appears to be that no person born out of the British dominions, though "made a denizen, except such as are born of English parents, shall be capable to be of the privy council, or a member of either house of parliament, or to enjoy any office or place of trust either civil or military, or to have any grant of lands tenements or hereditaments from the crown to himself or to any other or others in trust for him": st. 12 & 13 W. 3, c. 2, s. 3.

§ 286. The conditions for naturalization under the act of 1870 are that the alien, "within such limited time before making the application . . . . . as may be allowed by one of her majesty's principal secretaries of state, either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the crown for a term of not less than five years, and intends when naturalized either to reside in the United Kingdom or to serve under the crown." The secretary of

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state may refuse the application without assigning any reasons. Naturalization Act 1870, s. 7.

§ 287. A natural-born subject who has become an alien under § 289, 291 or 297, or under § 294 if a widow, may be readmitted to British nationality under the same conditions as are required for naturalization, except that residence in any British possession will be equivalent to residence in the United Kingdom; and there will be the same discretion, the governors of British possessions enjoying that discretion therein like the secretary of state in the United Kingdom. The readmission will only operate from its date, and will be subject to a qualification similar to that mentioned in § 284. Naturalization Act 1870, s. 8.

§ 288. The legislature of any British possession may make laws "for imparting to any person the privileges or any of the privileges of naturalization, to be enjoyed by such person within the limits of such possession." Naturalization Act 1870, s. 16.

Generally, the question of a person's being a British subject or an alien must be decided by the law of the United Kingdom; but if he thus prove to be an alien, his rights and those of others will be affected by that fact to the extent and in the manner determined by the law of that part of the British dominions which is concerned. *Donegani* v. *Donegani*, 1835, 3 Knapp 63, Shadwell; *Re Adam*, 1837, 1 Mo. P. C. 460, Erskine. If a qualified naturalization should be conferred by a colonial law under this §, its operation would be in effect the same as though privileges were given in the colony to aliens under certain conditions.

Declarations of Alienage and Expatriation.

§ 289. "Any person who by reason of his having been born within the dominions of her majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state, and is still such subject;" also

. . .

"any person who is born out of her majesty's dominions of a father being a British subject;

"may, if of full age and not [an infant, lunatic, idiot or married woman], make a declaration of alienage,"

"and from and after the making of such declaration shall cease to

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be a British subject."—Naturalization Act 1870, s. 4, the words in brackets from s. 17.

§ 290. British nationality acquired by naturalization is also lost by making a declaration of alienage, where this country has a convention with the country of origin, permitting the subjects of that country who have been naturalized as British subjects to divest themselves of that status. Naturalization Act 1870, s. 3.

§ 291. Any person not an infant, lunatic, idiot or married woman, loses his British nationality by voluntarily becoming naturalized in a foreign state, while in that state. Naturalization Act 1870, ss. 6, 17.

§ 292. If a person entitled to both British and foreign nationality proves by his conduct that he chooses the latter, though without having made a declaration of alienage, supposing that he was entitled to make one; and if the foreign country in question accepts him as its subject, but without naturalizing him, so that § 291 does not apply; it may be proper to treat him as an alien for the purposes of public international law.

Drummond's Case, on the award of the commissioners for liquidating the claims of British subjects in France, 1834, 2 Knapp 295, Shadwell. See the *Countess de Conway's Case*, on the same award, 1834, 2 Knapp 364, Parke, as to the circumstances under which the protection due to a British subject may be claimed by one not strictly such.

But he must still be considered as a British subject for the purpose of transmitting that character to his children under the acts quoted in § 282.

Fitch v. *Weber*, 1847, 6 Ha. 51, Wigram.

§ 293. The loss of British nationality does not discharge from any liability in respect of any act done before such loss. Naturalization Act 1870, s. 15.

Effect of Family Relations on Nationality.

§ 294. "A married woman shall be deemed to be a subject of the state of which her husband is for the time being a subject." Naturalization Act 1870, s. 10, (1).

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§ 295. "Where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom shall be deemed to be a naturalized British subject." Naturalization Act 1870, s. 10, (5).

§ 296. "Where the father, or the mother being a widow, has obtained a certificate of readmission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother shall be deemed to have resumed the position of a British subject to all intents." Naturalization Act 1870, s. 10, (4).

§ 297. "Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of" § 289, 290, 291 or 294, or of this §, "every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalized, and has according to the laws of such country become naturalized therein, shall be deemed to be a subject of the state of which the father or mother has become a subject, and not a British subject." Naturalization Act 1870, s. 10, (3).

Transfer of Nationality in cases of Cession.

§ 298. The cession of a British territory, or the acknowledgment of its independence, causes the loss of their British nationality by all persons domiciled within it at the date of the cession.

Doe v. *Acklam*, 1824, 2 B. & C. 779, Abbott and (?).

§ 299. Unless they transfer their domicile to some territory which remains British, either within the time limited for that purpose by the treaty, or immediately, if no such time be limited.

Doe v. *Mulcaster*, 1826, 5 B. & C. 771, Abbott, Bayley and Holroyd; *Doe* v. *Arkwright*, 1833, 5 C. & P. 575, Parke; *Jephson* v. *Riera*, 1835, 3 Kn. 130, Erskine.

The judgment in *Re Bruce*, 1832, 2 C. & J. 436, 2 Tyr. 475, Bayley and

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Lyndhurst, is expressed as if the court thought that a youth, who was nineteen at the date of the acknowledgment of the independence of the United States, could elect his nationality either then or on attaining his majority two years afterwards, the treaty limiting no time. But this can scarcely be so, and the question in the case did not require such a decision.

Nationality in the case of a Personal Union between two Kingdoms, and in that of the Dissolution of such a Union.

§ 300. "While the crowns of two countries are held by the same person, the inhabitants of the two countries are not aliens in the two countries respectively," but on the dissolution of the personal union between Hanover and England the Hanoverians already born became aliens in England.

Isaacson v. *Durant*, 1886, 17 Q. B. D. 54; Coleridge, delivering the judgment of himself, Hawkins and Mathew. The quotation is from the judgment, p. 59.

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CHAPTER XVI.

CORPORATIONS AND PUBLIC INSTITUTIONS.

BESIDES the natural persons with whom we have hitherto been chiefly concerned, private international law has to do with those artificial persons to which the law of every country gives a technical existence. One class of these is composed of corporations, in which natural persons called corporators or members, and their successors, are united as a body having legal personality and perpetual succession. The general rule of Roman law appears to have been that three members were required for a corporation; *Neratius Priscus tres facere existimat collegium, et hoc magis sequendum est:* Dig. 50, 16, 85. But a corporation was not dissolved by being reduced to a single member; *sed si universitas ad unum redit, magis admittitur posse eum convenire et conveniri, cum jus omnium in unum reciderit et stet nomen universitatis:* Dig. 4, 4, 7, 2. In England however we are familiar with corporations never having more than one member, corporations sole as distinguished from corporations aggregate. Another class of artificial persons was presented in Roman law, and is presented now in that of many countries, by institutions for public purposes, as colleges or hospitals, enjoying legal personality without so much as a single corporator, and therefore said *personæ vice fungi.* In England we do not possess this kind of artificial person, the property of such institutions being always vested either in corporations or in unincorporated trustees. With regard to both classes the same international principles rule. The regulation of any artificial person, in matters concerning only itself or the relations of its members, if any, to it and to one another, must depend on the law from which it derives its existence. That law is its personal law, or in other words it is domiciled in the country of that law.

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If in other countries it enters into relations with outside parties, the first question to be asked is whether by the laws of those countries it is permitted to do so in its artificial character. In case of the affirmative, its dealings with outside parties must stand on the same footing as those of a natural person domiciled abroad. If its artificial personality is not recognized for the purpose in question, no natural person can be liable on the dealing except on the ground of agency or of holding out; and in discussing any such ground it must be borne in mind that the corporators, if any, associated together on the footing of no other law than that of the domicile of the corporation.

A company whose registered office is in Scotland is domiciled and ordinarily resident there, within the meaning of Order IX of 1883, rule 1, (*c*) and (*e*): *Jones* v. *Scottish Accident Insurance Company Limited*, 1886, 17 Q. B. D. 421; Day Pollock, Cave: *Watkins* v. *Scottish Imperial Insurance Company*, 1889, 23 Q. B. D. 285; Stephen, Mathew, Grantham.

The desirableness of treating in one place the questions which arise out of administration in bankruptcy has led us to consider certain applications of these principles, in §§ 131–133. No more direct consequence can be drawn from the principles than that a company which derives its incorporation or other legal existence from another law than that of England cannot be dissolved in an English winding up, though the previous stages of such a winding up may be employed for the purpose of making its English property available for the payment of its debts. In pursuing further the subject of artificial persons, we will commence with a § relating to those public institutions which in most countries are organized as or by means of such persons, and the rest of the chapter will relate chiefly to corporations.

§ 301. Where the English court, in administering a will, finds that money is given for a charitable purpose intended to be domiciled abroad, it must first be assured that the purpose can be lawfully accomplished in the country in question, and then it will hand over the money to the trustees or other parties indicated by the testator, to be applied to them subject to the law and jurisdiction of that

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country. The court will not settle a scheme for the government of the foreign charity.

Provost of Edinburgh v. *Aubery*, 1754, Ambler 236, Hardwicke; *Oliphant* v. *Hendrie*, 1784, 1 Bro. C. C. 571, Thurlow; *Att.-Gen.* v. *Lepine*, 1818, 2 Sw. 181, 1 Wils. Ch. 465, Eldon, reversing Grant, who in 1815 had settled a scheme, 19 Ves. 309; *Minet* v. *Vulliamy*, 1819, 1 Russ. 113, note, Plumer; *Emery* v. *Hill*, 1826, 1 Russ. 112, Gifford; *Mayor of Lyons* v. *East India Company*, 1836, 1 Mo. P. C. 175, 1 Mo. I. A. C. 175, Brougham; *Att.-Gen.* v. *Sturge*, 1854, 19 Beav. 597, Romilly; *New* v. *Bonaker*, 1867, L. R., 4 Eq. 655, Malins. In *Mayor of Lyons* v. *East India Company* Brougham said: "the court has gone further of late years than Lord Hardwicke thought he could in *Provost of Edinburgh* v. *Aubery*, for he then held that he could give no directions as to the distribution": 1 Mo. P. C. 295, 1 Mo. I. A. C. 293. But this was founded on a misapprehension as to *Oliphant* v. *Hendrie*, and as to a certain case of *Cadell* v. *Grant* referred to in the argument of *Att.-Gen.* v. *Lepine* before the master of the rolls; and on a strange and peculiar case of *Att.-Gen.* v. *City of London*, 1790, 3 Bro. C. C. 171, 1 Ves. Jun. 243, Thurlow. Brougham, in the course of the same judgment, thus gave the reason of the general rule. "The objection in the ordinary case to administering a foreign charity under the superintendence of the court is this: those who are engaged in the actual execution of it are beyond the court's control, and those who are within the jurisdiction are answerable to the court for the acts of persons as to whom they can derive no aid from the court. Such an office will not easily be undertaken by any one, and its duties cannot be satisfactorily performed; at least the party must rely more on the local, that is the foreign, authorities for help, than on the court to which he is accountable." 1 Mo. P. C. 297, 1 Mo. I. A. C. 295.

The Attorney-General may be given liberty to apply to the foreign court for the settlement of a scheme: *Yeates* v. *Fraser*, 1883, 22 Ch. D. 827, Fry.

§ 302. The English court will not interfere in the internal disputes of foreign corporations.

Sudlow v. *Dutch Rhenish Railway Company*, 1855, 21 Beav. 43; Romilly, who pointed out that all the court could do for the plaintiff would be to make a declaration in his favour, which would be inoperative in the country where the company was established.

In *Lewis* v. *Baldwin*, 1848, 11 Beav. 153, Langdale, the bill appears to have proceeded also on matters not internal to the Irish railway company, and it was open to the court in the further progress of the suit to abstain from deciding the internal matters. In *Pickering* v. *Stephenson*, 1872, L. R., 14 Eq. 322, Wickens, the company, though Turkish, was managed in England, and it does not seem to have been strenuously argued that the Turkish courts had exclusive jurisdiction. For the credit of the company it may not have been desirable to take such a line; and it was at least held that Turkish law governed.

§ 303. A foreign corporation is not liable to income-tax on its

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entire profits, as a "person residing within the United Kingdom," notwithstanding that it has a branch house of business in London, and that the regular meetings of its shareholders are held in London; but it is liable to income-tax on the profits arising from the business carried on by it in England, as a natural person residing abroad would be.

Att.-Gen. v. *Alexander*, 1874, L. R., 10 Exch. 20; Kelly, Cleasby, Amphlett: *Erichsen* v. *Last*, 1881, 7 Q. B. D. 12, Lindley, Watkin Williams, Mathew; affirmed 1881, 8 Q. B. D. 414, Jessel, Brett, Cotton. See *Gilbertson* v. *Fergusson*, 1879, 5 Ex. D. 57; Huddleston and Pollock, Kelly dissenting; substantially affirmed 1881, 7 Q. B. D. 562, by Bramwell, Brett and Cotton; a peculiar case with regard to income-tax on dividends paid in the United Kingdom on shares in a foreign company.

§ 304. An English, Scotch or Irish corporation is liable to income-tax on its entire profits, as a "person residing within the United Kingdom," notwithstanding that all its business is carried on abroad, and that subsequently to its incorporation it has been registered abroad.

Cesena Sulphur Company Limited v. *Nicholson* and *Calcutta Jute Mills Company Limited* v. *Nicholson*, decided together in 1876, 1 Ex. D. 428, by Kelly and Huddleston. The latter, it is true, said that the incorporation of a company was not conclusive of its residence, and that the true question was "where the real business is carried on"; but the reasons he gave for thinking that the real business of the companies in question was carried on in England merely amounted to their government being in England, particularly noticing the situation of the registered offices, which however was necessarily in the United Kingdom as a condition of incorporation under the companies acts.

And an English, Scotch or Irish corporation is not entitled to deduct in its return for income-tax interest paid abroad on its debentures: *Alexandria Water Company* v. *Musgrave*, 1883, 11 Q. B. D. 174; Brett, Cotton, Bowen.

§ 305. There is no technical objection to suit in England by a foreign corporation or other artificial person. It may sue, subject to the question whether the local law of the transaction authorized it to act in its corporate or other artificial character.

Dutch West India Company v. *Henriques*, 1724, Strange 612, C. P.; 1728, Strange 807, Lord Ray. 1532, B. R.; 1730, Strange 808, Lord Ray. 1535, H. of L.: *Dutch East India Company* v. *Henriques*, 1728, Cooke's Rep. of Pr. Ca. in C. P. 44: *National Bank of St. Charles* v. *De Bernales*, 1825, 1 C. & P. 569, Ry. & Mo. 190, Abbott. The first and third cases show that, where there is a

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question about the corporate name, the identity of the corporation is treated as a question of fact. It is needless to quote later authorities in support of the §, but it must be observed that all the cases I know are those of corporations; still, a hospital or college entitled *personæ vice fungi* would clearly fall within the same principle.

§ 306. It might in the beginning have been questioned how far the laws of the United Kingdom allow a corporation deriving its artificial personality from a foreign or colonial authority to carry on business in the United Kingdom, so as to acquire a right of suit on contracts entered into in the course of such business.

There are businesses essentially of an international character, such as that of a common carrier between two countries; and it would not be possible universally to refuse to a railway or steamboat company, incorporated in one of those countries for such a purpose, the right to have an office in the other country, and to contract there with reference to the purpose of its existence. In states where the government is entrusted with a discretion as to granting or refusing to foreign corporations the right to act within the territory, such right might in certain cases be refused even to a company desiring to act as a common carrier between that territory and another. But where, as in England, the government has no such discretion, the courts of law can only act on general rules, and there would be extreme inconvenience in their laying down a general rule of exclusion for the case of trades which necessarily involve two countries in the sphere of their operations. This would be to invite measures of retorsion against English companies similarly circumstanced abroad.

On the other hand, the companies act 1862 provided that thenceforth no association of more than ten persons should be formed for the business of banking, or of more than twenty persons for any other business, "unless it is registered as a company under this act, or is formed in pursuance of some other act of parliament or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the stannaries:" s. 4. And there had previously been legislation of a similar kind. Is it possible to suppose that parliament, while on the one hand strictly limiting unincorporated associations, and on the other hand strictly regulating domestic

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incorporation, intended to leave the whole field of English business open without regulation to associations possessing foreign incorporation? If not, is the construction of an act of parliament elastic enough to allow a distinction, certainly not deducible from its words, to be drawn between trades which necessarily involve two countries in the sphere of their operations, and other trades? Again, if the judges are constitutionally authorized to draw such a distinction, could it without the aid of parliament be made sufficiently definite and certain in practice?

In fact however the right of foreign and colonial corporations to carry on business in England, without any authority to that effect from parliament or government, has now passed unquestioned for so long that it may be considered to be established; and it is a very exceptional instance of liberality.

In Newby v. *Van Oppen and Colt's Patent Firearms Manufacturing Company*, 1872, L. R., 7 Q. B. 293; Cockburn, Blackburn, Mellor, Quain; a United States' corporation, carrying on business in England "just as an English corporation might do," was allowed to be sued on a contract made in England in the course of such business. "We see from this case," said Blackburn in delivering the judgment of the court, "that there is at least one American corporation that has set up a branch business here, and there will probably soon be more." Yet the only points argued, or noticed in the judgment, were that a foreign corporation could not be sued in an English court at all, and that if suable the defendant corporation had not been properly served. It may be said that the defendant corporation could not repudiate the lawfulness of the business it had carried on, but that no remark should have been made on the lawfulness of that business, when the probable frequency of the case was adverted to, may be taken as proof that no doubt about it had occurred to the judges. Similarly in *re Colonial Mutual Life Assurance Society*, 1882, 21 Ch. D. 837, Chitty, a company incorporated in the colony of Victoria and carrying on the business of life insurance in England was treated as something quite regular, though the case did not involve the enforcement of any contract made by the company in England. The British government has concluded conventions with various foreign countries—as France and Belgium in 1862, and Spain in 1883—in almost identical terms, which may be thus quoted from the convention with Spain: "Joint-stock companies and other associations, commercial, industrial and financial, constituted in conformity with the laws in force in either of the two contracting states, may exercize in the dominions of the other all their rights, including that of appearing before tribunals for the purpose of bringing an action or of defending themselves, with the sole condition in exercizing such rights of always conforming themselves to the laws and customs in force in the said dominions:" *London Gazette*, 6 Feb. 1883, p. 643. That such conventions should have been con-

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cluded without seeking parliamentary authority or ratification implies that the British government must have been advised that the foreign corporations in question could already exercize all their rights in England, and the most obvious interpretation of that expression, though certainly not the only possible one, would include the right of carrying on business in England. In *Bateman* v. *Service*, quoted below under § 308, it was assumed that it would be "contrary to the comity of nations to prevent a foreign incorporated company carrying on business at all:" 6 App. Ca. 391. It can scarcely have been unknown to the judicial committee that, in general, it is only by express authority that foreign incorporated companies are allowed to carry on business. The meaning therefore probably was that since no special provision for the grant of such authority in proper cases had been made by the legislature of Western Australia, it would be a breach of comity to interpret the general law of that colony as refusing it in any case; an argument which, if sound, would apply to England.

On the other hand, in *Bank of Montreal* v. *Bethune*, 1836, 4 Upper Canada K. B. 341, Robinson, Sherwood and Macaulay; and in *Genesee Mutual Insurance Company* v. *Westman*, 1852, 8 Upper Canada Q. B. 487, Robinson, Burns and Draper; it was held that a bank incorporated in Lower Canada, and an insurance company incorporated in New York, could not sue on contracts made by them in Upper Canada in the course of carrying on business there. In each case it was considered that the company was acting beyond the powers given by its charter, the true construction of which limited the business of the company to the country where it was granted; but Robinson and Sherwood plainly intimated their opinion that even in the absence of this point the common law of England, as the law of Upper Canada, would have refused to a foreign corporation the power of carrying on business within the territory.

§ 307. Personal rights, not involving the question of authority to act in England in the artificial character, are certainly enjoyed in England by foreign corporations or other artificial persons, the same as by foreign natural persons.

Right to protection of trademark: *Collins Company* v. *Brown*, 1857, 3 K. & J. 423, Wood; *Collins Company* v. *Reeves*, 1858, 4 Jur. N. S. 865, Stuart.

§ 308. When the members of a corporation are not individually liable for its acts by the law from which it derives its personality, they cannot be sued in England for any acts done by it where it has authority to act in its corporate character.

General Steam Navigation Company v. *Guillou*, 1843, 11 M. & W. 877; Abinger, Alderson, Parke, Gurney: *Bateman* v. *Service*, 1881, 6 Ap. Ca. 386, Couch.

§ 309. A foreign corporation may be served out of the jurisdiction with notice of a writ, as well as a foreign natural person.

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Westman v. *Aktiebolaget Ekmans Mekaniska Snickarefabrik*, 1876, 1 Ex. D. 237; Kelly, Bramwell, Amphlett: *Scott* v. *Royal Wax Candle Company*, 1876, 1 Q. B. D. 404; Cockburn, Quain, Pollock.

§ 810. A foreign corporation may be served with a writ within the jurisdiction, if it carries on business there and has there an officer "in the nature of a head officer, whose knowledge would be that of the corporation," and on whom the writ is served.

Newby v. *Van Oppen and Colt's Patent Firearms Manufacturing Company*, 1872, L. R., 7 Q. B. 293; judgment of himself, Cockburn, Mellor and Quain, delivered by Blackburn. The quotation in the § is from the judgment, p. 296. *Lhoneux Limon & Co.* v. *Hong Kong and Shanghai Banking Corporation*, 1886, 33 Ch. D. 446, Bacon. *Haggin* v. *Comptoir d' Escompte de Paris; Mason and Barry* v. *the same;* 1889, 23 Q. B. D. 519; Cotton, Fry and Lopes, affirming Field and Cave.

Of course the § assumes that the corporation is suable within the jurisdiction, and as to Scotch or Irish corporations it is therefore subject to Order IX of 1883, rule 1 (*e*), as to which see the cases quoted on p. 222.

In *Carron Iron Company* v. *Maclaren*, 1855, 5 H. L. 416, Cranworth and Brougham, St. Leonards dissentient; reversing the same case, *sub. nom. Maclaren* v. *Stainton*, 1852, 16 Beav. 279, Romilly; and in *Mackereth* v. *Glasgow and South Western Railway Company*, 1873, L. R., 8 Exch. 149, Bramwell, Cleasby and Pollock; the service was held bad on the question of fact as to whether the business in England and the officer served there were of sufficient importance. In the first of those cases Cranworth did not discuss that question, thinking, as also did Brougham, that even if the service was good there was a substantial want of jurisdiction to grant the injunction appealed from, by which a Scotch corporation was restrained from proceeding in Scotland against the Scotch property of its deceased debtor, on the ground that a decree for the administration of his will had been made in England, where the deceased was domiciled. See § 107.

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CHAPTER XVII.

FOREIGN JUDGMENTS AND PROCEEDINGS.

§ 311. THE judgment of a competent foreign court, by which a party is personally condemned to pay a certain sum, may be sued on in England as a new cause of action in the nature of those called simple contracts. Formerly there was a fiction that the defendant had promised to pay the amount, for which promise the judgment was held to be a sufficient consideration; and he was not allowed to dispute that fiction, if all the circumstances concurred which were necessary to make the judgment a sufficient consideration. But now the writ may be simply indorsed thus: "The plaintiff's claim is £1,000, upon a judgment of the Court in the empire of Russia." *Supreme Court of Judicature Act* 1875.

Hence the action might formerly be either debt or *indebitatus assumpsit*: *Walker* v. *Witter*, 1778, 1 Doug. 1; Mansfield, Willes, Ashhurst, Buller. And the action still comes under any rule of procedure relating to contracts, on the ground that "the liability of the defendant arises upon the implied contract to pay the amount of the foreign judgment": *Grant* v. *Easton*, 1883, 13 Q. B. D. 302; Brett, Baggallay, Bowen. "This action is brought upon an English judgment, which, until a judgment was obtained in Jersey, was in that country no more than evidence of a debt:" *Hawksford* v. *Giffard*, 1886, 12 Ap. Ca. 122, Herschell; p. 128.

As to the technical mode of enforcing calls made in the Scotch or Irish winding up of companies on contributories resident in England, see *re Hollyford Copper Mining Company*, 1869, L. R., 5 Ch. Ap. 93, Giffard, and *re City of Glasgow Bank*, 1880, 14 Ch. D. 628, Jessel.

§ 312. Or without being made the subject of a personal action, the simple contract debt created by a foreign judgment may be enforced against assets in England in the same way as an English debt.

Dupleix v. *De Roven*, 1706, 2 Vern. 540, Cowper.

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§ 313. And in the admiralty division of the high court, as formerly in the court of admiralty, effect can be given *in rem* to the sentence *in rem* of a foreign court having admiralty jurisdiction or what is equivalent thereto. Also, if the writ is indorsed as on a personal sentence, still effect *in rem* may be given if it appears that the proceedings abroad were on a maritime lien, naturally leading to a sentence *in rem*.

"'Tis a ruled case that one judge must not refuse, upon letters of request, to execute the sentence of another foreign judge, when the persons or goods sentenced against are within his jurisdiction; and if he do, his superior must compel him to it; else it is a sufficient ground for reprizals against the territory": Sir Leoline Jenkins, 1667, in Wynne's Life of Jenkins, vol. 2, p. 762. In arguing *Jurado* v. *Gregory*, 1670, 1 Ventris 32, king's bench, Finch, afterwards lord Nottingham, said with the approval of the court "that where sentence is obtained in a foreign admiralty one may libel for execution thereof here, because all the courts of admiralty in Europe are governed by the civil law, and are to be assistant one to another, though the matter were not originally determinable in our court of admiralty." Sir. R. Phillimore, sitting in the admiralty division of the high court, said: "I am of opinion that it is the duty of this court to act as auxiliary to the Portuguese court, and to complete the execution of justice which, owing to the departure of the ship, was necessarily left unfinished by that court. In other words, it is my duty to place the English court in the position of the Portuguese court after its sentence has been given against the defendants." *The City of Mecca*, 1879, 5 P. D. 28; at p. 32, after quoting Jenkins and Finch as above, and other old authorities. The Portuguese court was in this case a tribunal of commerce. The judgment was reversed, on its appearing that the proceedings in Portugal were not on a maritime lien; 1881, 6 P. D. 106; Jessel, Baggallay, Lush.

In most continental countries foreign judgments are not treated as new causes of action, but are admitted to execution, or declared executory as it is called, after a special proceeding for that purpose. It would seem from the language of Jenkins and Finch that in the ancient forms of the English court of admiralty the mode of proceeding on a foreign sentence was somewhat similar; and what has been said above, p. 139, as to the ancient cooperation of the courts of different countries in bankruptcies, may be compared. The English courts of common law and equity never joined in any such system of express cooperation, but their doctrine that foreign judgments created new debts or causes of action led to results to a large extent similar, and like questions arose under each system as to the conditions of the

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validity of foreign judgments, and as to the right or duty of examining them before directly or indirectly enforcing them.

§ 314. The foreign judgment *in personam* which is to be sued on or otherwise enforced as above shown must be such as lays on the defendant a present duty to pay. If in its own country it cannot be executed pending the time allowed for appealing, or pending an appeal, it cannot be enforced in England during the interval; but if there is no such stay of execution in its own country the pendency of an appeal will not be a bar to an action in England, though it may afford ground for the equitable interposition of the English court to prevent the possible abuse of its process, and on proper terms to stay execution in the action.

No action, where the foreign judgment could be executed in its own country, pending the appeal, only subject to security being given for repayment in case of reversal: *Patrick* v. *Shedden*, 1853, 2 E. & B. 14; Campbell, Wightman, Crompton. Where nothing was shown as to effect of appeal in country of judgment, appeal no bar, but might afford ground, &c.: *Scott* v. *Pilkington*, 1862, 2 B. & S. 11; Cockburn, Crompton, Blackburn. See also *Alivon* v. *Furnival*, 1834, 1 C. M. & R. 297, Parke and (?).

A Spanish *remate* judgment is not a final one, in such a sense as to enable it to be sued on in England: *re Henderson*, *Nouvion* v. *Freeman*, 1889, 15 Ap. Ca. 1, Herschell, Watson, Bramwell, Ashbourne; affirming S. C., 1887, 37 Ch. D. 244, Cotton, Lindley, Lopes; which reversed S. C., 1887, 35 Ch. D. 704, North.

§ 315. Also the duty to pay laid on the defendant must be a duty to pay in settlement of the cause of action. A foreign order to pay a sum of money into court, to be disposed of according to a judgment thereafter to be given, cannot be enforced in England.

Paul v. *Roy*, 1852, 15 Beav. 433, Romilly.

§ 316. And a foreign collateral order to pay the costs of any proceeding cannot be enforced in England.

Sheehy v. *Professional Life Assurance Company*, 1857, 2 C. B., N. S. 211; Cresswell, Cockburn, Crowder.

§ 317. Although a foreign judgment which awards costs while disposing of the cause of action may be enforced in England for the costs.

Russell v. *Smyth*, 1842, 9 M. & W. 810; Abinger, Parke, Alderson, Rolfe; where the costs were given in a foreign suit for divorce.

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§ 318. The foreign judgment must be for a sum certain.

And therefore, if any costs are to be deducted from the sum awarded by the judgment, they must have been taxed in the foreign court before it can be sued on: *Sadler* v. *Robins*, 1808, 1 Camp. 253; Ellenborough, Grose, Le Blanc, Bayley. But since the original cause of action is not deemed in England to merge in a foreign judgment, if the latter be for a sum certain with liberty to the defendant to establish a counterclaim it will none the less be evidence in England in favour of the plaintiff, though the defendant may have ground to apply for a stay of proceedings in order that he may establish his counterclaim abroad according to the liberty reserved: *Hall* v. *Odber*, 1809, 11 East 118; same four judges.

§ 319. Coming now to the question of competence reserved in § 311, a court within the jurisdiction of which the defendant has expressly elected a domicile, with a view to legal proceedings relating to certain matters, is competent for such proceedings.

Vallée v. *Dumergue*, 1849, 4 Exch. 290; Alderson, Pollock, Rolfe, Platt. It is of course only a particular case of this, if the defendant has become party to an instrument by which his domicile for the purpose of the obligations thereby created is declared to be at a certain spot, in default of his electing another: *Copin* v. *Adamson*, 1874, L. R., 9 Exch. 345, Kelly, Amphlett & Pigott; 1875, 1 Ex. D. 17, Cairns, Blackburn & Brett.

§ 320. But where by the proper law of a contract, *lex loci contractus* or *solutionis* as the case may be, a party to the contract is deemed to elect a certain domicile for legal proceedings relating to it, it is doubtful whether the court of that domicile, as such, is competent.

In *Meeus* v. *Thellusson*, 1853, 8 Exch. 638; Pollock, Parke, Martin; leave to amend a replication was granted, though the amendment would have been useless except on the footing of the affirmative of this question, which however had not been argued. The question arose again in *Copin* v. *Adamson*, quoted under the last §, but became unimportant by reason of the decision on the point there mentioned. Kelly was for the affirmative, in the particular case of the contract made by taking shares in a company, and Cairns, though the question was not argued on the appeal, seems to have inclined to the same opinion; but Amphlett and Pigott maintained the negative. The general case appears to me not to be distinguishable from that of § 322, for if the *lex contractus* does not otherwise carry with it the *forum contractus*, it can scarcely do so the more because it appoints a certain place, as a domicile deemed to have been elected, at which notices with a view to proceedings in the *forum contractus* may be

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served. And the particular case does not appear to me to be distinguishable from the general one.

§ 821. It may probably be considered as now settled that the *forum rei* is admitted in England as a sufficient ground of competence for a foreign judgment which it is sought to enforce, whether that forum be grounded on political nationality; on domicile in the sense, admitting but of one domicile, in which it must be taken when used as the criterion of personal law; or on domicile in the looser sense in which it may be taken in those countries which are familiar with it as the ground of jurisdiction. "If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or as it is sometimes expressed owing temporary allegiance to that country, we think that its laws would have bound them." Blackburn, delivering the judgment of himself, Mellor, Lush and Hannen, in *Schibsby* v. *Westenholz*, 1870, L. R., 6 Q. B. 161.

This doctrine long remained obscure, as might be expected from the fact that the competence of the English courts themselves with regard to personal obligations had not been based either on allegiance or on domicile. In the older cases, where the foreign judgment had been pronounced against an absent defendant, the endeavour was to determine in each instance whether it was agreeable to natural justice that the defendant should be held to be bound.

In *Buchanan* v. *Rucker*, 1807, 1 Camp. 63, Ellenborough, and 1808, 9 East 192, Ellenborough and (?), constructive notice was held not to bind one who had never been "present" in the country; and it may be inferred from some of the expressions used that what was intended was that it should not bind one who had never been "resident" in it. In *Cavan* v. *Stewart*, 1816, Star. 525, Ellenborough said: "it is perfectly clear on every principle of justice that you must either prove that the party was summoned, or at least that he was once on the island. In the case before Lord Mansfield it was in proof that the person leaving the island left an attorney in his place to act for him." Here again it is not certain that "was once on the island" should not be read as "resided once."

In *Becquet* v. *MacCarthy*, 1831, 2 B. & Ad. 951; Tenterden, Parke, and (?);

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the foreign law required the process to be served on a public officer, but made no provision for his communicating with the absent party. This was held sufficient, because "it must be presumed that" the officer "would do whatever was necessary in the discharge of that public duty." Brougham said in *Don* v. *Lippmann*, 1837, 5 C. & F. 21: "*Becquet* v. *MacCarthy* has been supposed to go to the verge of the law, but the defendant in that case held a public office in the very colony in which he was originally sued."

In *Obicini* v. *Bligh*, 1832, 8 Bi. 335, where the admiralty court at Malta had given damages and costs against the captor of a ship brought in there, but which did not seem to have been submitted by the captor for adjudication, the proof was defective, but Tindal and Gaselee appear to have considered that it would have been unnecessary to prove actual notice to the captor, because it was his duty to take the cause into the court.

In *Douglas* v. *Forrest*, 1828, 4 Bing. 686, Best and (?), it would seem to have been held that the domicile of origin is a competent forum when the defendant retains property there after establishing a domicile elsewhere, perhaps also subject to the condition that the debt sued for was contracted there. "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." U. s., p. 703. Though allegiance is mentioned it would seem that domicile must have been intended, for the case was one of a judgment recovered in Scotland against a Scotchman who had gone to live in India, so that his British allegiance afforded no ground for suing him in Scotland rather than in the British courts in India.

That domicile, coupled with the possession of property in the territory, is a sufficient ground of competence for a foreign judgment, appears to have been assumed by all the judges in *Cowan* v. *Braidwood*, 1840, 1 M. & Gr. 882, 2 Sc. N. R. 138; Tindal, Bosanquet, Coltman, Maule. See § 323, as to the possession of property within the territory, referred to in this case and *Douglas* v. *Forrest*.

In *Reynolds* v. *Fenton*, 1846, 3 C. B. 187, Tindal, Maule and Cresswell, the only point which seems to have been thought material was whether the defendant had had the opportunity of defending the foreign suit.

§ 322. With regard to the *forum speciale obligationis*, it must be remembered that even according to Roman principles, which are the only ones that can be asserted as possessing any claim to general reception, this forum is not constituted by the obligation alone, but is subject to the condition that the defendant is either present in the territory or possesses property there. See above, p. 208. On the other hand the English courts, which at first did not possess this forum at all, afterwards for some time enjoyed under act of parliament a jurisdiction over defendants out of the territory and not possessing property within it, in cases of contracts made in England

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and torts and breaches of contract occurring within the jurisdiction. And they now enjoy a jurisdiction over defendants out of the territory and not possessing property within it, in the case of the breach of a contract which according to its terms ought to be performed in England. See above, p. 220. It might therefore be expected that the older English authorities should be silent about the *forum speciale obligationis* as a ground of competence for foreign judgments, but that the newer ones should show some disposition to admit that ground without insisting on the Roman limitations. And the facts correspond with such an expectation.

Probably the earliest case in which this ground for foreign competence was distinctly considered is *Schibsby* v. *Westenholz*, in the judgment in which (see above, p. 344) it was said: "if at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws" [meaning jurisdiction] "of that country bound them; though before finally deciding this we should like to hear the question argued:" L. R., 6 Q. B. 161. In this case the defendants possessed no property in the country of the judgment, and it may be doubted whether under the circumstances the Roman *forum contractus* would have been in that country, even had they been casually present and made the contract there, although those who systematically defend the importance of the *locus celebrati contractus* would answer that query in the affirmative. In *Rousillon* v. *Rousillon*, 1880, 14 Ch. D. 351, where also the defendant possessed no property in the country of the judgment, Fry refused to give effect to a judgment obtained in France, the *forum contractus celebrati*, without notice to the defendant; and he mentioned as "a very material circumstance" that the contract, "though made in France, was evidently intended to be performed in England": p. 357.

§ 323. With regard to the possession of property in the territory as one of the alternative conditions for putting in force the Roman *forum speciale obligationis*, I said in 1858 that "the simple rule would be, when that condition is satisfied, to respect the title gained to any property by the plaintiff in the attachment suit, at the same time admitting the payment as a discharge of and protection to the garnishee, but not even then to enforce the judgment *in personam* for the balance not liquidated by the attachment, because the *locus contractus*, without either domicile or presence, does not found a purely personal jurisdiction:" Private International Law, p. 368. I understand this to be in substantial agreement with another passage

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of the judgment in *Schibsby* v. *Westenholz*, 1870, L. R., 6 Q. B. 168. "We should however point out that whilst we think that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas* v. *Forrest*, we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground. It should rather seem that, whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment. But it is unnecessary to decide this, as the defendants had in this case no property in France. As to this, see *London and Northwestern Railway Company* v. *Lindsay*." The case thus referred to was one on Scotch law, decided in 1858.

Cavan v. *Stewart*, quoted under § 321, was an action against the garnishee in the foreign suit, and such garnishee was not allowed to plead in answer to his creditor the payment which he had been compelled to make in that suit. It is therefore at variance with the doctrine submitted in this §.

§ 324. Where the legislation of any country establishes a *forum actoris*, that is a jurisdiction founded on circumstances neither personal to the defendant nor connected with the obligation, but personal to the plaintiff—as is done by art. 14 of the Code Napoleon; see above, p. 211—this will not be considered a sufficient ground of competence for enforcing such a judgment in England.

Schibsby v. *Westenholz*, 1870, L. R., 6 Q. B. 155; Blackburn, Mellor, Lush, Hannen.

Supposing that the court in which the foreign judgment was pronounced is not deemed to have been internationally competent on any of the grounds which have been considered, the judgment may yet be enforceable in England by reason of the conduct of the party with relation to the suit in which it was pronounced.

§ 325. "We think it clear, upon principle, that if a person selected as plaintiff the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that

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tribunal was not binding upon him." In *Schibsby* v. *Westenholz*, as quoted in § 321, L. R., 6 Q. B. 161.

Where the judgment of a foreign court was pleaded by the defendants in England as conclusive on the plaintiffs, Parke, delivering the judgment of himself, Abinger, Alderson and Gurney, pointed out that the plaintiffs "did not select" the foreign tribunal, in which case "the determination might possibly have bound them: they were mere strangers, who put forward the negligence of the defendant as an answer in an adverse suit in a foreign country, whose laws they were under no obligation to obey." In *General Steam Navigation Company* v. *Guillou*, 1843, 11 M. & W. 894.

§ 326. But does the defendant bind himself by appearing and defending the foreign suit? "We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal. But we must observe that the decision in *De Cosse Brissac* v. *Rathbone* is an authority that where the defendant voluntarily appears, and takes the chance of a judgment in his favour, he is bound." In *Schibsby* v. *Westenholz*, as quoted in § 321, L. R., 6 Q. B. 162.

In *De Cosse Brissac* v. *Rathbone*, 1861, 6 H. & N. 301; Martin, Channell and Wilde; it was averred in the plea which failed that the defendants were possessed of property in the country of the judgment, liable to seizure in case of judgment by default, and that they appeared and defended the suit in order to prevent such seizure. In *Molony* v. *Gibbons*, 1810, 2 Camp. 502, Ellenborough, the fact that the defendant appeared in the foreign suit by an attorney who made no defence to it was held reason enough for enforcing the judgment against him. Indeed Ellenborough, who in *Cavan* v. *Stewart*, as quoted under § 321, appears to have been willing to content himself with proof that the party had been summoned, would *a fortiori* have been content with proof that he had appeared. A similar remark may be made with regard to the judges who decided *Reynolds* v. *Fenton*, also quoted under § 321. On the other hand, see *General Steam Navigation Company* v. *Guillou*, as quoted under the last §. And the doctrine suggested by the quotation in the present § appears to be the only logical conclusion from the view that it is not his own opportunity to appear, but the competence of the court, by which a party is bound.

§ 327. A peculiar case, which may perhaps best be classed as one of competence, is presented when by the law of a company's domicile the shareholders in it are personally liable on its contracts, and a judgment obtained against it may be executed against any of such shareholders although they were not individually parties to the

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action. Such a judgment may be enforced in England by action against any shareholder, as if it was a judgment rendered against him by a court to the competence of which he had subjected himself by accepting shares in the company. Indeed the foreign action may be considered as having been in fact brought against the individual shareholders in a collective name, and on that footing the question of enforcing it in England against a shareholder would be strictly one of competence.

Bank of Australasia v. *Harding*, 1850, 9 C. B. 661; Wilde, Maule, Cresswell, Talfourd: *Bank of Australasia* v. *Nias*, 1851, 16 Q. B. 717; Campbell, Patteson, Coleridge, Wightman.

It must be observed that the competence which has been spoken of in this chapter is territorial competence, and has nothing to do with the rules by which litigation may be portioned out among different courts existing in the same country, as for instance between the tribunals of commerce and what are called civil tribunals in France. If the foreign suit was not brought in the right court of a country territorially competent, this was matter of defence which ought to have been pleaded in that court: *Vanquelin* v. *Bouard*, 1863, 15 C. B., N. S. 341; pp. 350, 13th plea, 368, Erle, and 374, Keating. And the party is therefore estopped from taking the objection in England, as we shall see in § 328. But since territorial competence is the ground of the duty under which the party lies to obey the foreign judgment, he must be entitled to question that competence when an action is brought against him for nonperformance of such duty.

Supposing it to be established that the foreign court was competent, or that the defendant in England is precluded from objecting to its competence, there arises the question whether its judgment has the force of *res judicata*. In the continental system of declaring foreign judgments executory, the form of this question is whether such declaration must be preceded by an examination of the substance of the judgment as to its accuracy in fact and law. In the Anglo-American system of suing on a foreign judgment, the form is

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whether such judgment is a conclusive proof of the claim decreed for by it, or merely a presumptive one which the defendant may rebut by showing it to be erroneous in fact or law. The judgments of the several states which composed the old German empire had mutually the force of *res judicata*, but those of states foreign to that empire had not that force within it. In the Germanic body which was instituted at the Congress of Vienna the system of reciprocity was adopted, so that the judgments of German states, and those of all other states which allowed the force of *res judicata* to German judgments, but those only, were admitted to execution without examination; and by §§ 660 and 661 of the Code of Procedure for the German empire, which came into operation in 1879, a foreign judgment is not to be put in execution in Germany unless the courts of its proper country are in the practice of giving effect in like manner to the judgments of German courts. The same system has prevailed widely over Europe, as for example in Denmark, Switzerland, and the Sardinian and Papal states; and in Spain reciprocity is required in the absence of treaty, but the foreign judgment is executed if there are no precedents showing want of reciprocity. In France the practice of the courts has at last settled that every foreign judgment must be examined, though this conclusion, depending on the interpretation of the codes and the continuance in force of the 121st article of the ordinance of 1629, was long disputed. In Belgium and Rhenish Prussia, as the question rested on the French codes introduced without the ordinance of 1629, foreign judgments were allowed the force of *res judicata;* except in Belgium French judgments, by the law of 9 September 1814, and in Rhenish Prussia, by the decisions of the courts, judgments given against inhabitants of Prussia in countries where Prussian judgments are submitted to examination. In Sweden and Norway, where neither the foreign judgment is declared executory, as in most continental countries, nor is sued on as in England, but a new action is brought on the original cause, the foreign judgment is treated in such action as at the utmost a presumption favourable to the plaintiff.

§ 328. In England it is now established, after much uncertainty,

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that the judgment of a foreign competent court is in general a conclusive proof of the claim decreed for by it. "Several pleas," said lord Denman, delivering the judgment of himself, Williams, Coleridge and Wightman, in *Henderson* v. *Henderson*, 1844, "were pleaded to show that the defendant had not had justice done him in the court of chancery at Newfoundland. This is never to be presumed, but the contrary principle holds unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign court, are repugnant to natural justice; and this has often been made the subject of inquiry in our courts. But it steers clear of an inquiry into the merits of the case upon the facts found, for whatever constituted a defence in that court ought to have been pleaded there." 6 Q. B. 298. What is here said about repugnance to natural justice refers chiefly to the discussions as to the sufficiency of the mode taken in the foreign court for summoning an absent defendant, which were common before the system of testing the authority of the foreign court by fixed principles of jurisdiction had become so far established in England as we have seen it to be. Whenever competence is based on the *forum rei* or the *forum situs*, technical means must be used for conveying notice to an absent defendant, which must sometimes fail of conveying actual notice to him in cases where nevertheless the interests of justice require that the suit shall proceed. It is not likely that in any civilized country, such as those between which the rules of private international law apply, these technical means should be so glaringly insufficient as to furnish a reason for declining to enforce in England its judgment against an absent defendant, in a case where the court was competent on principles generally recognized. Without however denying that such cases may possibly occur, or forgetting that the reservations of the court in *Henderson* v. *Henderson* may receive other applications where the foreign law embodied in the judgment is contrary to stringent notions of morality or public policy entertained in England, and still more where the question involves the law or jurisdiction of some state scarcely civilized enough to be admitted within the intercommunion of private international law, it remains that the judgment of the competent court of an ordinary European

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or American state cannot be questioned in England for error either in fact or in law.

This was the doctrine of lord Nottingham, who allowed one partner to charge another with money paid for a partnership debt under a foreign sentence, "the justice whereof," he said, "is not examinable here." *Gold* v. *Canham*, 1679, from Nottingham's MSS. in 2 Sw. 325: S. C., 1 Ca. in Ch. 311. From *Cottington's case*, 1678, same MSS. in 2 Sw. 326, it appears that that great judge was led to this doctrine by the respect due to foreign sentences in matrimonial causes, and to the practice of enforcing foreign admiralty judgments, as to which see above, p. 341. In *Sinclair* v. *Fraser*, where the court of session in Scotland had put a party to prove over again a demand for which he had obtained judgment in Jamaica, the house of lords declared "that the judgment of the supreme court of Jamaica ought to be received as evidence *prima facie* of the debt, and that it lies upon the defendant to impeach the justice thereof, or to show the same to have been irregularly or unduly obtained:" 1771; 1 Doug. 4 a, 20 State Trials 468. Perhaps the terms of this declaration do not imply any greater deduction from the authority of a foreign judgment than is contained in the reservations of the court in *Henderson* v. *Henderson*, but it seems to have been understood at the time as allowing an examination without limit, and Mansfield said in *Walker* v. *Witter*, "foreign judgments are a ground of action everywhere, but they are examinable:" 1778, 1 Doug. 6. In *Galbraith* v. *Neville*, 1789, 1 Doug. 6, the two systems were put in open opposition, Kenyon saying, "I cannot help entertaining very serious doubts concerning the doctrine laid down in *Walker* v. *Witter*, that foreign judgments are not binding on the parties here"; while Buller said, "the doctrine which was laid down in *Sinclair* v. *Fraser* has always been considered as the true line ever since, namely that the foreign judgment shall be *prima facie* evidence of the debt, and conclusive till it be impeached by the other party."

Since then Mansfield and Buller have been followed by Eyre; "we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law": in *Philips* v. *Hunter*, 1795, 2 H. Bl. 410. By Bayley in *Tarleton* v. *Tarleton*, which was an action on a covenant of indemnity applicable to a foreign suit in which a judgment had been obtained against the plaintiff; "as between the parties to the suit the justice of it might be again litigated, but as against a stranger it cannot": 1815, 4 M. & S. 23. And at least to some extent by Romilly, in *Reimers* v. *Druce*, 1857, 23 Beav. 150. On the other hand Shadwell adopted the doctrine of Nottingham and Kenyon, in *Martin* v. *Nicolls*, 1830, 3 Sim. 458. And Brougham's dicta in *Houlditch* v. *Donegall*, 1834, 8 Bl. N. R. 301, 2 C. & F. 470, and in *Don* v. *Lippmann*, 1837, 5 C. & F. 1, though formally in favour of the examinable character of foreign judgments, are such that it may be doubted whether he had more in his mind than the examination of them with regard to competence or sufficiency of notice to the defendant, or to such differences of law as exist between Christian and Mahometan countries.

The doctrine of Nottingham and Kenyon was ultimately established by *Henderson* v. *Henderson*, quoted in the §: *Bank of Australasia* v. *Nias*, 1851, 16 Q. B. 717; Campbell, Patteson, Coleridge, Wightman: *De Cosse Brissac* v. *Rathbone*, 1861, 6 H. & N. 301; Martin, Channell, Wilde: and *Vanquelin*

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v. *Bouard*, 1863, 15 C. B., N. S. 341 ; Erle, Williams, Keating: so that it is unnecessary to cite any later authorities. In the two last cases the judgment in question was a foreign one in the strict sense, but although in the first two the judgments were colonial, the language of the court in each of them put colonial and strictly foreign judgments on a par. A doubt was thus settled which might have been founded on *Henderson* v. *Henderson*, 1843, 3 Ha. 100—see pp. 117, 118—Wigram, namely whether colonial judgments were not entitled to some higher degree of authority, as being subject to appeal to this country.

§ 829. It has been said that where English law was properly applicable to the decision of the foreign suit, and the foreign court has mistaken that law, the English court must not enforce its judgment; also that the same result follows where the foreign court selected, for the decision of the suit before it, the law of a country which was not applicable according to the maxims of private international law received in England. But these views have become discredited in proportion as the idea has gained ground that the obligation to obey a foreign judgment is based on the competence of the court, and that the true subject of inquiry is not whether on the whole, in the case from time to time presented, it is agreeable to natural justice that the defendant should be held to be bound. The errors referred to may be more easily ascertainable by the English court than other errors of law or fact, but in their relation to the merits of the case they do not seem to differ from other errors.

In *Arnott* v. *Redfern*, 1825, 2 C. & P. 88, Best's opinion at *nisi prius* was against enforcing a foreign judgment in the cases here supposed, but on argument pursuant to leave reserved the point proved to be immaterial. In *Novelli* v. *Rossi*, 1831, 2 B. & Ad. 757, Tenterden and (?), the defendant was held not to be discharged by a French judgment in his favour in which English law had been mistaken ; but Blackburn in *Castrique* v. *Imrie*, 1870, L. R., 4 E. & I. A. 435, has pointed out that the case might have been argued and decided on other grounds. Romilly in *Reimers* v. *Druce*, 1857, 23 Beav. 156, inclined against enforcing a foreign judgment proceeding on what he deemed an erroneous view of private international law, but the point was not material. In *Godard* v. *Gray*, 1870, L. R., 6 Q. B. 139, Blackburn and Mellor decided against admitting a mistake of English law as a defence ; but Hannen was not prepared to decide that such a mistake, appearing on the face of the foreign proceedings, might not be used as a defence by a party who in those proceedings had adduced proper evidence of the English law. The same decision, the point reserved by Hannen not arising, was given in *re Trufort*, *Trafford* v. *Blanc*, 1887, 36 Ch. D. 600, Stirling.

In *Meyer* v. *Ralli*, 1876, 1 C. P. D. 358, Archibald, Coleridge and Grove, it

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was admitted by the parties that the foreign court had mistaken its own law, and its judgment was accordingly disregarded.

§ 330. A foreign judgment would of course not be enforceable in England if it were shown that it had been obtained by the fraud of the party seeking to enforce it.

Sinclair v. *Fraser*, as quoted above, p. 352 ; *Blake* v. *Smith*, 1810, 8 Sim. 303, Eldon ; *Bowles* v. *Orr*, 1835, 1 Y. & C. Exch. 464, Abinger ; *Price* v. *Dewhurst*, 1837, 8 Sim. 279, Shadwell, in which the principle is applied to a decision given by interested persons in their own favour ; *Ochsenbein* v. *Papelier*, 1873, L. R., 8 Ch. App. 695, Selborne and Mellish affirming Malins.

In fact the respect due to an English judgment is as much forfeited by fraud in procuring it as that due to a foreign one. See the authorities collected in the reporter's note to *Innes* v. *Mitchell*, 1857, 4 Dr. 102.

Action on a Russian judgment : defence, that plaintiff fraudulently concealed from the Russian court that she had the goods for which the judgment was given in her possession all the time. Defence admitted, because the issue whether she had the goods was not the same as the issue whether she fraudulently misled the court as to her having them, though the evidence might be the same on both. *Abouloff* v. *Oppenheimer*, 1882, 10 Q. B. D. 295, Coleridge, Baggallay and Brett affirming Mathew and Cave.

§ 331. When the judgment of a foreign court was given as by confession, or on an award where the submission to arbitration contemplated the intervention of that court, the questions of competence and *res judicata* which have been considered in this chapter do not arise, but it must be seen that the judgment was duly confessed, or is in accordance with the submission to arbitration. In fact a claim on such a judgment is a claim on contract.

Henley v. *Soper*, 1828, 8 B. & Cr. 16 ; Tenterden, Bayley, Holroyd, Littledale ; and *Alivon* v. *Furnival*, 1834, 1 C. M. & R. 277, 4 Tyr. 751, Parke and (?) ; judgments on awards. *Frankland* v. *McGusty*, 1830, 1 Knapp 274, Leach ; judgment as by confession, but confession not duly proved.

§ 332. It cannot be said of the claim for which a foreign judgment has been given that *transit in rem judicatam :* the plaintiff may sue in England on the original cause as well as on the judgment until the latter is satisfied, and it is common in the cases before the judicature acts to find counts on each in the same declaration.

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Maule v. *Murray*, 1798, 7 T. R. 470, (?) : *Hall* v. *Odber*, 1809, 11 East 118; Ellenborough, Grose, Le Blanc, Bayley: *Smith* v. *Nicolls*, 1839, 5 Bi. N. C. 208; Tindal, Bosanquet and Erskine, while Vaughan seems not to have been quite of the same opinion: *Bank of Australasia* v. *Harding*, 1850, 9 C. B. 661; Wilde, Cresswell and Talfourd, Maule doubting: *Bank of Australasia* v. *Nias*, 1851, 16 Q. B. 717; Campbell, Patteson, Coleridge, Wightman. In *Newland* v. *Horsman*, 1681, 2 Ch. Ca. 74, 1 Vern. 21, according to the former report it was not argued that the foreign sentence excluded the jurisdiction, but only what regard ought to be paid to it; while if Nottingham thought that the action would not lie on the original cause after full determination abroad, as the report in Vernon may indicate, it must be remembered that the foreign sentence was in a court of admiralty: see above, pp. 341, 352.

When the foreign judgment has been satisfied by the defendant, it is a satisfaction of the claim on which it was given; it becomes equivalent to a judgment in his favour, as to which see the next §: *Barber* v. *Lamb*, 1860, 8 C. B., N. S. 95; Erle, Willes, Byles, Keating.

§ 333. A judgment for the party defendant in England, rendered in a foreign court of competent jurisdiction, and being such that it is conclusive in its own country, is also a conclusive bar to any attempt to reopen the matter in England.

Burrows v. *Jamineau*, 1726, as above, p. 268, and Dick. 48, King; where the party sued on his acceptance in England had been the plaintiff abroad, in a suit to have the acceptance vacated: *Plummer* v. *Woodburne*, 1825, 4 B. & C. 625, Abbott, Bayley, and (?); colonial judgment not conclusive only because it might have been in the nature of a nonsuit: *Ricardo* v. *Garcias*, 1845, 12 C. & F. 368, Lyndhurst, Brougham and Campbell; not at variance as to the point of the § with the decision of Shadwell in the same case, 1844, 14 Sim. 265: *Société Générale de Paris* v. *Dreyfus Brothers*, 1887, 37 Ch. D. 215: Cotton, Lindley, Lopes. And if the foreign proceedings were *in personam*, an adverse judgment in them will not the less exclude the plaintiff from proceeding in England *in rem*; Lushington, in *The Griefswald*, 1859, Swabey 435. See also *General Steam Navigation Company* v. *Guillou*, quoted under §§ 325 and 326, in which case the efficacy of the bar, even had it been properly pleaded, was questioned by the judges on the ground that the foreign court was not competent to bind the party defendant before it, and therefore also not competent for binding any one else towards that party.

§ 334. Similarly the English court, after a final judgment in favour of a defendant, will restrain the plaintiff by injunction from prosecuting in another country a suit for the same matter.

Booth v. *Leycester*, 1837, 1 Keen 579, Langdale.

§ 335. But a foreign judgment pleaded by the defendant will be

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subject to question, with regard to the competence of the court or otherwise, on the same grounds, so far as applicable, on which a foreign judgment sued on by the plaintiff may be questioned.

"If the decree of the supreme court" of Newfoundland "is conclusive upon one party, it must I conceive be conclusive upon both; and if not conclusive upon both, it ought to be conclusive upon neither: Wigram, in *Henderson* v. *Henderson*, 1843, 3 Ha. 117.

§ 336. And because the plaintiff has been refused certain relief abroad, it will not follow that he is not entitled to other relief in England on the same facts.

Callandar v. *Dittrich*, 1842, 4 M. & Gr. 68, 4 Sc. N. R. 682; Tindal, Coltman, Erskine, Cresswell: relief by way of rescission of contract having been refused abroad, plaintiff may still sue for damages in England on the same facts.

See the next §.

§ 337. "The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercizing reasonable diligence, might have brought forward at the time:" Wigram, in *Henderson* v. *Henderson*, 1843, 3 Ha. 115. On the other hand: "It is indeed true that the case made by the second bill," in England, "must be taken to have been known to the plaintiff at the time of the institution of the first," in New South Wales, "and might have then been brought forward, and it may be said therefore that it ought not now to be entertained; but I find no authority for this position in civil suits, and no case was cited at the bar, nor have I been able to find any, in which a decree of dismissal of a former bill has been treated as a bar to a new suit asking the same relief, but stating a different case giving rise to a different equity:" Westbury, in *Hunter* v. *Stewart*, 1861, 31 L. J., N. S., Ch. 346, reversing Wood, 1 H. & M. 226, who had relied on Wigram as cited above. What is chiefly remarkable here is that both Wigram and Wood on the one side, and Westbury on the other, treat the question as the same, whether the judgment set up as conclusive be English or foreign. It will be observed that the case

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before lord Westbury, the same relief prayed on different facts, is the converse of that in § 336, different relief prayed on the same facts.

The sentence of a foreign court of admiralty, condemning a ship as enemy's property, is conclusive evidence in favour of the underwriters against the warranty of neutrality: *Geyer* v. *Aguilar*, 1798, 7 T. R. 681; Kenyon, Ashhurst, Grose, Lawrence. This point is rather anomalous, with reference to the principles of the doctrine of *res judicata*; but it illustrates the identity of treatment which that plea receives, whether the judgment invoked be English or foreign.

§ 338. *Lis pendens.* When the plaintiff in England has previously for the same cause commenced proceedings in another country which are still pending, there is no general rule that this is an answer to the English action. "The proper course in such cases is to apply here to stay proceedings in one or other of the suits, and the court will upon such an application have no difficulty in putting the plaintiff under terms": Parker in *Ostell* v. *Lepage*, 1851, 5 De G. & S. 106. See the same case, 1852, 2 D. M. G. 892, Knight-Bruce and Cranworth. The plaintiff had there obtained a decree for account at Calcutta, but such a decree until the accounts have been taken under it presents only a case of *lis pendens* and not one of judgment. "As to the inconvenience, considering the difficulties of administering justice between parties occasionally living under the separate jurisdictions, I think the parties ought to be amenable to every court possible, where they are travelling from country to country; and we must then endeavour to correct the mischief of these double suits as much as we can, by allowing in each country the benefit of all the other proceedings in the other part of the king's dominions": Camden in *Bayley* v. *Edwards*, 1792, 3 Sw. 711, appeal from Jamaica.

"The principles by which the court ought to be guided in applications of this nature"—that the plaintiff may be ordered to elect between English and foreign actions—"were fully examined and discussed in the case of *McHenry* v. *Lewis*"—1882, 22 Ch. D. 397; Jessel, Cotton and Bowen, affirming Chitty, 1882, 21 Ch. D. 202; which was an application by the defendants to stay the English pro-

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ceedings on account of concurrent litigation abroad. "That case," lord justice Lindley proceeded, "appears to me to be a most valuable decision. As I understand it it comes to this, that where the plaintiff is suing in this country and also abroad in respect of the same matter, and a motion is made to compel the plaintiff to elect, it is not sufficient for the person so moving to point out that there are two proceedings being taken with reference to the same matter; he must go a step further and show that there is vexation in point of fact, that is to say that there is no necessity for harassing the defendant by double litigation. Moreover I think the court ought to be very cautious before it interferes in cases of that kind, and for this reason: the court here is not and cannot be alive to all the advantages which a person may expect to derive from suing in the foreign court." In *Peruvian Guano Company* v. *Bockwoldt*, 22 Ch. D. 225; Jessel, Lindley and Bowen, 1883, affirming Bacon, 1882.

See *Dillon* v. *Alvares*, 1798, 4 Ves. 357, Loughborough: *Imlay* v. *Ellefsen*, 1802, 2 East 453, Ellenborough and (?): *Naylor* v. *Eagar*, 1828, 2 Y. & J. 90; Garrow, Hullock, Vaughan: *Cox* v. *Mitchell*, 1859, 7 C. B., N. S. 55; Erle, Williams, Crowder, Byles: *Scott* v. *Seymour*, 1862, 1 H. & C. 219; Pollock, Martin, Bramwell, Wilde, Wightman, Williams, Crompton, Willes, Blackburn: *The Mali Ivo*, 1869, L. R., 2 A. & E. 356, Phillimore: *Wilson* v. *Ferrand*, 1871, L. R., 13 Eq. 362, Malins: *The Catterina Chiazzare*, 1876, 1 P. D. 368, Phillimore: *The Christiansborg*, 1885, 10 P. D. 141; Hannen, affirmed by Baggallay and Fry, Esher dissenting: *Thornton* v. *Thornton*, 1886, 11 P. D. 176; Cotton, Bowen and Fry, affirming Butt: *Mutrie* v. *Binney*, 1887, 35 Ch. D. 614; Cotton, Lindley and Lopes, reversing North. *Dillon* v. *Alvares* and *Cox* v. *Mitchell* were commented on by the court of appeal in *McHenry* v. *Lewis*, where it was laid down that the vexatious character of double litigation will be more easily established when the other action is in Scotland or Ireland, and probably also where it is in a British dependency, than where it is in a country politically foreign.

As to the defendant in foreign proceedings commencing proceedings in England having an intimate connection with their subject, see *Transatlantic Company* v. *Pietroni*, 1860, Johns. 604, Wood: *Law* v. *Garrett*, 1878, 8 Ch. D. 26, Bacon affirmed by Baggallay, James and Thesiger. The latter case shows that an agreement to refer disputes to a foreign court is an agreement to refer to arbitration within the meaning of the common law procedure act, 1854, s. 11. Defendant in a proceeding *in rem* in a British dependency having commenced an action *in personam* in England, his proceedings were stayed as a matter of discretion: *The Peshawur*, 1883, 8 P. D. 32, Phillimore.

If there was only *lis pendens* abroad at the date of the commencement of the English action, a judgment rendered abroad during the progress of the latte

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will not be deemed to constitute *res judicata;* the English court should have been applied to, to compel an election between the two proceedings: *The Delta, The Erminia Foscolo*, 1876, 1 P. D. 393, Phillimore.

And it would seem that *lis pendens in personam* abroad is not a reason for so much as putting the plaintiff *in rem* in England to his election: *The Bold Buccleugh*, 1851, 7 Mo., P. C. 267, Jervis.

As to proceedings in England for the preservation of property pending litigation abroad, see *Cruikshank* v. *Robarts*, 1821, 6 Mad. 104, Leach, and *Transatlantic Company* v. *Pietroni*, as above.

§ 339. When the English proceedings are the first commenced, "there can be no doubt that the general rule precludes parties from proceeding in any other court for the same purpose for which they are proceeding in this court, whether the other proceedings are taken in this or in any other country; and if the party conceives there are any circumstances in his case which constitute an exception to the rule, I think that his proper course is not to take proceedings in another court of his own authority, but to apply to this court for permission to take such proceedings": Cottenham in *Wedderburn* v. *Wedderburn*, 1840, 4 M. & Cr. 596. The principles on which it will be determined whether the double litigation will be allowed are the same as in the case of § 338: in *Peruvian Guano Company* v. *Bockwoldt*, there quoted, the English action was the first commenced.

Hyman v. *Hehn*, 1883, 24 Ch. D. 531; Brett, Cotton and Bowen, affirming Chitty; where the defendant in England took proceedings abroad, and it was held that a special case of vexation must be made out in order to restrain him.

A creditor who had come in before the master after decree in an administration suit was restrained from proceeding with an action afterwards commenced by him in Scotland for the same debt: *Graham* v. *Maxwell*, 1849, 1 M. & G. 71, Cottenham affirming Shadwell.

§ 340. The authority of a foreign judgment *in rem* on the property in a movable has been considered in § 149, p. 177; and that of a foreign sentence of divorce in §§ 50 and 51, p. 88. The conditions under which authority will be allowed in England to a foreign judgment on the validity of a marriage have not been thoroughly discussed. That such a judgment, by a court "having proper jurisdiction," would be conclusive, was said by Hardwicke in *Roach* v. *Garvan*, 1748, 1 Ves. Sen. 159; but the opportunity for saying

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what was proper jurisdiction did not arise. Finch (Nottingham)'s remarks in *Cottington's Case*, 1678, 2 Sw. 326, are not less vague, and the foreign sentence which gave occasion to them was one of divorce. Simpson in *Scrimshire* v. *Scrimshire*, 1752, laid great stress on the *forum contractus celebrati*; 2 Hagg. Cons. 408, 419. And Scott (Stowell) in *Sinclair* v. *Sinclair*, 1798, 1 Hagg. Cons. 297, did the same, not however like Simpson on the ground of the supposed competence of the forum, but because "the validity of marriage must depend in a great degree on the local regulations of the country where it is celebrated," which the courts of that country can best appreciate; and he added that he was "not prepared to say that a judgment of a third country, on the validity of a marriage not within its territories, *nor had between subjects of that country*"—the italics are mine—"would be universally binding." Probably little importance would now be attached by the English court to the place of contracting a marriage, with reference to the authority of a judgment on it; but it is not as yet possible to state whether, and if so in what manner, the court would connect such authority with a system of personal jurisdiction.

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CHAPTER XVIII.

PROCEDURE.

§ 341. THE procedure of the English court is governed exclusively by English law.

That procedure is governed by the *lex fori* is a matter of private international law that has never been questioned in theory, though doubts have occurred on some of its applications. *Aut quæris*, says Bartolus, *de his quæ pertinent ad litis ordinationem, et inspicitur locus judicii.* It would be impossible to import into any court a new system of procedure for every case in which foreign things or acts might be involved, since there would exist neither the machinery nor the minute and curious learning necessary for it. Nor is there any reason why it should be desired to do so, for the principle of enforcing foreign rights, be it comity or justice, can be carried no higher than to place them on a level with domestic rights, entitling the party to the same remedies and subject to the rules incident to those remedies. It remains to mention certain applications of the maxim, and to guard against certain errors which might be made in applying it.

§ 342. The *lex fori* determines in what name an action must be brought, so far as that question can be separated from the question of the title sued on.

See § 135, and the cases on the name in which a foreign republic must sue, under § 192. See also *Wolff* v. *Oxholm*, 1817, 6 M. & S. 92, at p. 99; judgment of court delivered by Ellenborough.

§ 343. The term of prescription for personal actions is held in England to depend on the *lex fori*, but this rule is not universally received, and is questionable in principle: see §§ 238 and 239.

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The term of prescription for immovable property, however, depends on the *lex situs*; § 171. And see pp. 170, 280, as to the prescription of corporeal chattels.

§ 344. The *lex fori* determines whether any particular kind of claim, as that on a bill of exchange, is entitled to the benefit of a special procedure.

§ 345. The *lex fori* determines whether any personal constraint can be used, as by arrest or the writ *ne exeat regno*.

It was at one time supposed that there ought to be no arrest of the person on a contract the proper law of which gave no such procedure. *Talleyrand* v. *Boulanger*, 1797, 3 Ves. 447, Loughborough: *Melan* v. *Fitzjames*, 1797, 1 Bos. & Pul. 138; Eyre and Rooke, against Heath, who laid down the true principles; Eyre, as reported, treats "a personal obligation" as meaning an obligation on which the person can be arrested! *Flack* v. *Holm*, 1820, 1 J. & W. 405, 417, 418; where Eldon seems to have acted on the same view, with regard to the writ of *ne exeat regno*.

The true view was maintained by Ellenborough in *Imlay* v. *Ellefsen*, 1802, 2 East 455; in *De la Vega* v. *Vianna*, 1830, 1 B. & Ad. 284, Tenterden and (?); in *Brettillot* v. *Sandos*, 1837, 4 Scott 201, Tindal and Vaughan; and by Chelmsford in *Liverpool Marine Credit Company* v. *Hunter*, 1868, L. R., 3 Ch. Ap. 486.

§ 346. The *lex fori* determines whether a set-off can be pleaded, this being distinct from any defence to the claim itself that may be available.

Allen v. *Kemble*, 1848, 6 Mo. P. C. 314, Pemberton Leigh; explained by Cockburn in *Rouquette* v. *Overmann*, 1875, L. R., 10 Q. B. 541: Willes in *Meyer* v. *Dresser*, 1864, 16 C. B., N. S., 646, at p. 655.

But where the law of a bankruptcy lays down a rule of set-off as between the trustees, or by whatever other name the persons administering for the creditors may be called, and a debtor to the estate who is also a creditor of the bankrupt, the former are bound by that rule wherever they sue, because they take or represent the debtor's estate only subject to it.

Macfarlane v. *Norris*, 1862, 2 B. & S. 783; Cockburn, Wightman, Blackburn, Crompton.

§ 347. When, by the proper law of a contract made with an

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unincorporated firm, each partner in that firm may be made liable on it *in solidum* by some mode of procedure or other, the *lex fori* determines whether any partner may be sued individually before the others have been sued.

Bullock v. *Caird*, 1875, L. R., 10 Q. B. 276; Blackburn, Mellor, Field.

§ 348. The *lex fori* determines the admissibility and force of any particular kind of evidence. See §§ 124 and 207—209, as to certain questions which arise on the application of this rule.

The marginal note of *Tulloch* v. *Hartley*, 1841, 1 Y. & C. Ch. 114, Knight-Bruce, is misleading: the enrolment and record were an actual conveyance, by the *lex situs*, which was the proper law to decide that point; therefore the English law of evidence was not violated.

For the general point see *Bain* v. *Whitehaven and Furness Junction Railway Company*, 1850, 3 H. L. 1, Brougham; *Abbott* v. *Abbott*, 1860, 29 L. J., N. S., P. M. & A. 57, Cresswell; *Finlay* v. *Finlay*, 1862, 31 L. J., N. S., P. M. & A. 149, Cresswell.

§ 349. The rule of English law, by which a party or witness is excused from disclosing what may tend to expose him to criminal proceedings or to forfeiture, equally applies to cases where the criminal proceedings or forfeiture might be incurred abroad, provided the court be sufficiently informed of the foreign law under which they might be incurred.

United States of America v. *McRae*, 1867, L. R., 4 Eq. 327, Wood, 3 Ch. Ap. 79, Chelmsford; overruling as to the general proposition *King of the Two Sicilies* v. *Willcox*, 1851, 1 Sim. N. S. 301, Cranworth, the particular decision in which case however was admitted in the later one to have been right, because of the want of sufficient information as to the foreign law.

§ 350. As to the judicial discretion to suspend proceedings in order to have the benefit of the determination of some foreign law or matter by a foreign court, see the judgment of lord Selborne in *Phosphate Sewage Company Limited* v. *Molleson*, 1876, 1 Ap. Ca. 787.

§ 351. The *lex fori* determines all priorities which in any administration of assets may be allowed to certain classes of creditors or of unsecured debts, the assets being first cleared of all securities

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affecting them, for the question of security is one of property. See §§ 110 and 111, the latter being one of those exceptions which are said to prove rules, the priorities following the law of that which is deemed the proper forum for administration instead of that of the actual forum. Also § 148; and the rule that a foreign judgment ranks in England with debts by simple contract, in § 311.

§ 352. The *lex fori* determines the time allowed for appealing.

Lopez v. *Burslem*, 1843, 4 Mo. P. C. 300, Campbell.

Proof of Foreign Laws.

The mode of proving foreign laws, being a part of procedure, depends on the *lex fori;* but it will be useful here to give the English rules with respect to it.

§ 353. Foreign law is presumed to be the same as English, of course excluding those parts of the latter which only exist as special institutions with special machinery, as bankruptcy: the existence and operation of such institutions in any foreign country, and in other respects the difference between foreign and English law, must be averred and proved by any party, plaintiff or defendant, who relies on it.

Brown v. *Gracey*, 1821, Dow. & Ry., N. P., 41 note, Abbott and (?); *Smith* v. *Gould*, 1842, 4 Mo. P. C. 21, Campbell.

The English law lords, on an appeal from Scotland, will take judicial notice of the law of England, and not be bound by the evidence of that law given to the court below: *Douglas* v. *Brown*, 1831, 2 Dow. & Cl. 171, Brougham.

§ 354. Foreign law, or the difference between it and English law, being a fact in the cause, the jury, if there be one, must judge whether it is proved: the judge has only to instruct them the law of what country is the right one to apply.

§ 355. From the same circumstance, that foreign law or the difference between it and English law is a fact in the cause, it follows that it must be proved afresh whenever relied on, no matter how familiar the court may be with it from the evidence in previous actions.

McCormick v. *Garnett*, 1854, 5 D. M. G. 278, Knight-Bruce and Turner.

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Indeed it would be highly unsafe to assume that the foreign law had not been changed by some new statute or course of decision.

§ 356. The foreign law must always be proved by the evidence of experts: even when a code or a statute is concerned it is neither sufficient to produce such code or statute, nor is it necessary to produce it when an expert refers to it. "The opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men, and I think it is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents indeed might often mislead persons not familiar with the particular system of law: the witness is called upon to state what law does result from the instrument. I do not think that the case of treaties is applicable: there no class of persons are so peculiarly conversant with the subject matter as to invest it with the character of a science." Lord Denman in *The Baron de Bode's case*, 1844, 8 Q. B. 250. "The question for us is not what the language of the written law is, but what the law is altogether, as shown by exposition, interpretation and adjudication." Coleridge in the same case, p. 265.

To the same effect Cottenham, Brougham, Denman, Campbell and Langdale, in *The Sussex Peerage case*, 1844, 11 Cl. & F. 114—117. A different opinion was formerly entertained as to the mode of proving foreign law contained in written documents: the older authorities are quoted and criticized in *The Baron de Bode's case*.

The judgment of lord Langdale in *Nelson* v. *Bridport*, 1845, 8 Beav. 527, is worthy of attentive study, with reference to this and other §§ relating to the proof of foreign laws.

§ 357. The expert by whose evidence a foreign law is to be proved need not necessarily be a judge or lawyer engaged in its practice. "The witness is in a situation of importance; he is engaged in the performance of important and responsible public duties; and connected with them, and in order to discharge them properly, he is bound to make himself acquainted with this subject of the law of marriage. That being so, his evidence is of the nature of that of a judge. It is impossible to say that he is incompetent."

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Langdale in *The Sussex Peerage Case*, 1844, 11 Cl. & F. 134. "He comes within the description of a person *peritus virtute officii*." Cottenham in the same case, ib.

The certificate of the consul-general, or of the diplomatic representative of a country, has been received in proof of the law of that country: *Re Dormoy*, 1832, 3 Hagg. Eccl. 767, Nicholl; *Re Klingemann*, 1862, 3 S. & T. 18, Cresswell; *Re Prince P. G. Oldenburg*, 1884, 9 P. D. 234, Butt. Also the affidavit of a secretary to an embassy, who was officially required to know his country's law: *Re Dost Aly Khan*, 1880, 6 P. D. 6, Hannen.

But the evidence of the following persons is inadmissible. A merchant: *Clegg* v. *Levy*, 1812, 3 Camp. 166, Ellenborough. A private gentleman: admitted by Wightman in *Regina* v. *Dent*, 1843, 1 C. & R. 97; which case Cottenham said was contrary to "the universal opinion both of the judges and the lords," in *The Sussex Peerage case*, 1844, 11 Cl. & F. 134. A person whose knowledge of the law of a country is derived from having studied it at a university in another country: *Bristow* v. *Sequeville*, 1850, 5 Exch. 275, Pollock, Alderson, Rolfe, Platt; *Re Bonelli*, 1875, 1 P. D. 69, Hannen.

§ 358. When the experts have given their evidence, the part of the court has been stated by lord Langdale. "Though a knowledge of foreign law is not to be imputed to a judge, you may impute to him such a knowledge of the general art of reasoning as will enable him, with the assistance of the bar, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict. If the utmost strictness were required in every case, justice might often have to stand still; and I am not disposed to say that there may not be cases in which the judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case in question, especially if there should be a variance or want of clearness in the testimony. In the case of *Lindo* v. *Belisario* (*), in which the evidence taken upon the interrogatory was not clear and positive, lord Stowell thought that he should not transgress his duty if he looked beyond the evidence, but not farther than the evidence fairly led. And in both the cases of *Lindo* v. *Belisario* (*) and *Dalrymple* v. *Dalrymple* (†) I understand him not to have considered any authority opinion or passage not distinctly referred to by the

* 1795, 1 Hagg. Cons. 216.
† 1811, 2 Hagg. Cons. 54.

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witnesses, and so not to have looked farther than he considered the evidence to have fairly led, and yet to have gone beyond the evidence in considering for himself the effect of the authority referred to, with the view of acquiring for himself notions by which he might be better able to decide upon the effect of the varying or obscure testimony of the witnesses." In *Nelson* v. *Bridport*, 1845, 8 Beav. 537.

As soon indeed as it is allowed that foreign law is matter of fact to be proved by witnesses, the certainty arises that in many cases the evidence about it will be obscure or discrepant; and in those cases it seems inevitable that not only a judge but also a jury, when a jury is called on to decide, must exercise as much discretion in dealing with the evidence as is here claimed.

Chelmsford in *Di Sora* v. *Phillipps*, 1863, 10 H. L. 640, noticed that the privy council had since done in *Brewer* v. *Freeman*, 1857, 10 Mo. P. C. 306, what Langdale here claimed the right to do; and he reinforced Langdale's caution against using any source of knowledge beyond the passages referred to by the witnesses. The same thing was done by Cotton, Lindley and Lopes in *Concha* v. *Murieta*, *De Mora* v. *Concha*, 1889, 40 Ch. D. 543.

§ 359. By an act of 1859, st. 22 & 23 Vict., c. 63, any court within the British dominions may send a case for the opinion of a superior court in any other part of the British dominions, on the law administered by it as applicable to the facts set forth in such case. The parties may pray to be heard before the court whose opinion is asked, and the court which asked the opinion must apply it when obtained; with the option however, when it has been obtained before trial, of submitting it "to the jury with the other facts of the case as evidence, or conclusive evidence as the court may think fit, of the foreign law therein stated." But the house of lords or privy council, in the event of an appeal to them, will not be bound by any opinion so obtained from any court whose judgments are reviewable by them respectively.

§ 360. By an act of 1861, st. 24 & 25 Vict., c. 11, any superior court within the British dominions may send a case for the opinion of such superior court, in any foreign state with which her majesty shall have entered into a convention for the purpose, as shall be

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agreed on in such convention, on the law administered by it as applicable to the facts set forth in such case. But the court which asked the opinion will not be bound by it, and may return the case, with or without amendment, for further opinion, or similarly consult any other such superior court in the same state, and so from time to time. There is a corresponding provision for the British courts answering cases sent from abroad.

Various.

It will be sufficient to refer briefly here to certain topics of procedure which will be found enlarged on in the statute book or in books of practice.

§ 361. For the mode of proving

(1) Proclamations, treaties, and other acts of state of any foreign state or British colony:

(2) Judgments, decrees, orders and other judicial proceedings of any court of justice of any foreign state or British colony:

(3) Affidavits, pleadings, and other legal documents filed or deposited in any such court:

See st. 14 & 15 Vict. c. 99, s. 7.

§ 362. For the power of courts in the British dominions to take evidence in suits depending in other parts of the British dominions, see st. 22 Vict., c. 20, and *Campbell* v. *Attorney-General*, 1867, L. R., 2 Ch. Ap. 571, Turner and Cairns.

§ 363. As to the mode in which a foreign court ought to act on a requisition addressed to it by the English court, requesting it to summon witnesses and take their examination, see *Hitchins* v. *Hitchins*, 1866, L. R., 1 P. & M. 153, Penzance.

As to the reasons which will weigh with the English court, in determining whether to issue a commission to a foreign court for taking evidence, see *Berdan* v. *Greenwood*, 1880, 20 Ch. D. 764, note, Baggallay and Cotton; *Re Boyse, Crofton* v. *Crofton*, 1882, 20 Ch. D. 760, Fry.

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§ 364. Where British consuls are not allowed by the *lex loci* to administer oaths, affidavits may be sworn before the local authorities.

Re Fawcus, 1884, 9 P. D. 241, Hannen.

§ 365. An action for discovery only, in aid of proceedings in a foreign court, will not be entertained.

Dreyfus v. *Peruvian Guano Company*, 1889, 41 Ch. D. 151, Kay.

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CHAPTER XIX.

CONCLUSION.

We have now travelled through nearly all that can be found in the English precedents on the subject of this book. The exception is what relates to criminal jurisprudence and extradition, which were shown in the introduction to belong to private international law, but which for English purposes it would scarcely be convenient to include in one work with the civil part of the subject: moreover extradition has been exhaustively treated by Sir Edward Clarke. However, the authorities with regard to the bearing of foreign penal laws on property and personal capacity may be cited.

§ 366. It was said by Loughborough, delivering the judgment of the court in *Folliott* v. *Ogden*, 1789, 1 H. Bl. 135, that the penal laws of a foreign country create no personal disability to sue in this, and affect only what can be seized by virtue of their authority; that a fugitive from them can maintain all his other rights by action in England. And this doctrine was repeated by Buller on the appeal—*Ogden* v. *Folliott*, 1790, 3 T. R. 733—and by Ellenborough, delivering the judgment of the court in *Wolff* v. *Oxholm*, 1817, 6 M. & S. 99. It must therefore be deemed to be the doctrine received in England, and was referred to as such in § 16. But Grose in *Ogden* v. *Folliott*, 3 T. R. 735, reduced it within more reasonable limits, saying "that the penal laws of one country cannot affect the laws and rights of citizens of another." As affecting the property of its own subjects, there seems to be no reason why the operation of a foreign penal law should not be admitted, always supposing that it is not one which shocks our national sense of right, as a penalty imposed for religious belief would do, or one to enforce which would be in

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fact to take a side in the internal politics of the foreign country. Even however should this view be accepted, it might still be considered contrary to public policy that where a fugitive from criminal justice had made his escape into British territory, and for any reason was not subject to extradition, he should be unable lawfully to contract the tie of marriage.

Taking now a general view of the ground thus travelled over, it will be seen that the English jurisprudence on private international law embodies the idea that the civilized world is a united whole, for the acquisition of rights such as modern society depends on; and that wherever, or under whatever system of law, such rights have been acquired, they should be maintained by our courts when they come before them. This indeed is the idea embodied in the jurisprudence of every civilized country on the subject, though the form of the embodiment is far from being everywhere the same. And so, reverting to the point at which the introduction broke off, it may be said that the notion of comity has again given place to that of justice; that the notion of a conflict of laws has again given place to that of determining the proper application of each territorial law, so that conflict between them may be precluded by the satisfactory determination of their respective fields. But while in this direction the subject has tended to revert to its older form, in another the departure from that form has been at least maintained. It would now be as idle as ever, perhaps more so, to regard the subject as governed by maxims of universal acceptance, unless one were content with maxims too vague to be of much practical use.

Nor does the prospect of arriving at a real international agreement on the subject, by means of doctrinal writing, seem at all more hopeful than at any previous time. The directions in which such a result might be sought for are either historical or theoretical. The only historical direction that any one could think of pursuing is that of the Roman law, not as directly applicable, for it belonged to an empire in which a unity of law had been established, but by starting

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from its rules on jurisdiction, and assuming that when the most appropriate jurisdiction for each case has been found, the law of that jurisdiction will be applied to it. But the tendency of modern legislation in most countries is towards the enlargement of jurisdiction, which is certainly not without its convenience in multiplying the means of redress, but is as certainly unfavourable to that manner of looking at the subject in which jurisdiction might come to be an accepted basis for law. And the only theoretical direction in which I have ever seen much hope is that of determining the true law of each matter by means of Mr. Austin's analysis of the nature of law; but the more I have reflected on the affairs which courts of justice have to deal with, the more I have come to doubt whether that analysis, accurate though it be as an account of facts, is capable of throwing any light on what the decision should be on points that have not yet taken their place among the facts of jurisprudence.

To the English practitioner the difficulty of arriving at an international agreement by doctrinal writing will have but little importance, considering on the one hand the binding authority of precedent in our system, and on the other the extent to which the subject is now covered by English decisions. Nevertheless the want of an agreement is a mischief to commerce and to all other social international relations, and the attention of the government and parliament cannot be too strongly called to the necessity of a remedy, to be applied by conventions confirmed by statute. For that purpose every country will have to surrender some of the rules cherished by its lawyers, and this country no less than others, although the general equity of our jurisprudence is such that I believe I may add, no more than others. In a work intended for students and practitioners, it would be out of place to discuss the particular points of private international law on which England ought to concede, or to require concessions to be made to her. But I will close the volume by mentioning some of the topics on which international agreement appears to be both necessary and attainable.

First is the question whether political nationality or domicile

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should be the test of personal law and jurisdiction, where the former test can be applied.

Then comes the establishment of some system of voluntary registration, guarded by whatever conditions may be thought advisable, in aid of the ascertainment of domicile, which must always retain its importance as between territories with different laws comprized in the same empire, even although the first question should be decided in favour of political nationality. A step was taken in this direction by the st. 24 & 25 Vict., c. 121, empowering the government to conclude conventions on the basis of reciprocity, by which residence in the adopted country for one year immediately preceding the death of a testator or intestate, together with the public deposit of a written declaration of his desire to change the domicile, shall be made conditions of a change of domicile for all purposes of movable succession.

Thirdly, the establishment of common rules as to the jurisdiction which should be charged with administration in bankruptcy, and as to the effect to be given internationally to discharges in bankruptcy, is inferior to no part of the subject in commercial importance.

And fourthly there is the question how far different international rules should be maintained for immovable and for movable property.

A unity as to marriage and divorce is as important as any topic I have mentioned, but there we touch the point in which modern civilization has during more than three centuries been receding from unity, and perhaps will not regain it without first passing through an even greater diversity. And the list of agreements which are attainable as well as important is not exhausted. But enough will have been said if the attention of lawyers has been fixed on the necessity of doing something, since it is their opinion which must move and guide in the matter, although treaties and statutes are the instruments to be employed.

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